United States Court of Appeals for the District of Columbia Circuit



TRANSCRIPT OF RECORD

645

United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT No. 19,790

FAR EAST CONFERENCE, et al.,

Petitioners.

₹.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL MARITIME COMMISSION

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United States Court of Appeals
for the District of Columbia Circuit

FILED APR 3 1966

nathan Daulson

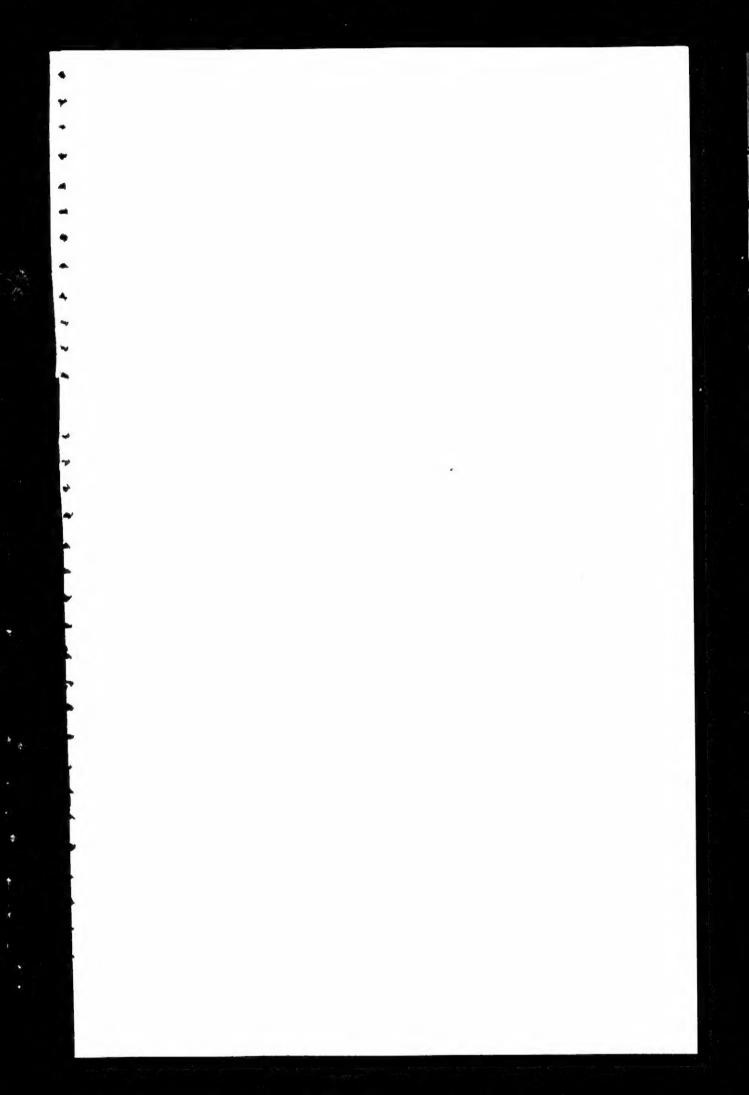


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Docket No. 1155

Commission's Report, Served February 3, 1965

[1]

FEDERAL MARITIME COMMISSION

No. 1155

Imposition of Surcharge on Cargo to Manila, Republic of the Philippines

Except as to newsprint out of Searsport, Maine, surcharges imposed by respondents on cargo from the United States to Manila found not to be in violation of sections 15, 16, 17 or 18(b)(5) of the Shipping Act, 1916.

Respondents Maersk Line and Pacific Star Line, by imposing a surcharge on newsprint at Searsport, Maine, while they do not apply a surcharge at nearby Canadian ports, have prejudiced and discriminated against shippers of newsprint at the Port of Searsport as well as the port itself.

Edward D. Ransom and Robert F. Fisher for Pacific Westbound Conference and member lines, respondents.

Elkan Turk, Jr. for Far East Conference and member lines, respondents.

George F. Galland for respondent Compagnie Maritime des Chargeurs Reunis.

Thomas R. Matias and Robert J. Blackwell, Hearing Counsel.

A. L. Jordan, Presiding Examiner.

REPORT

By THE COMMISSION: (John Harllee, Chairman; James V. Day, Vice Chairman; Ashton C. Barrett, George H. Hearn, John S. Patterson, Commissioners)

The Commission instituted this proceeding on its own motion to investigate the lawfulness of surcharges on cargo moving from ports in the United States to Manila, Republic of the Philippines. The purpose of the proceeding is to determine whether the surcharges are contrary to sections 15, 16, 17, and 18(b)(5) of the Shipping Act, 1916.

The Commission named as respondents the Pacific Westbound Conference and its members, the Far East Conference and its members, Hawaii Orient Rate Agreement and members, Pacific Star Line, Compagnie Maritime des Chargeurs Reunis, and Pacific Navigation System, Inc.

The Pacific Westbound Conference provides service to Manila from the Pacific Coast of the United States and Canada. The Far East Conference serves Manila from United States Atlantic and Gulf ports, but this range of service does not include Canadian Atlantic ports. Maersk Line, however, a Far East Conference member, serves Canada as an independent, and Isthmian [2] Lines, also a Far East Conference member, lifts Manila-bound cargo at Halifax, Nova Scotia. Pacific Star serves ports on the Atlantic coast of the United States and Canada as an independent, and Compagnie Maritime des Chargeurs Reunis provides independent service from United States Atlantic and Gulf ports. The service of Pacific Navigation is not described in the record.

The Far East Conference on July 25, 1963, and the Pacific Westbound Conference on July 29, 1963, filed with the Commission surcharges of \$10 per ton, as freighted,

on cargoes destined for discharge at Manila, to be effective October 28, 1963. At about this same time the other respondents imposed surcharges of \$10 per ton on cargo destined for discharge at Manila.

The Far East Conference, the Pacific Westbound Conference, and Pacific Navigation reduced their surcharges from \$10 to \$5 per ton, effective December 26, 1963; Hawaii/Orient reduced its \$10 surcharge to \$5, effective December 28, 1963; Pacific Star changed its surcharge from \$10 to 10 percent per ton, effective December 12, 1963; and Chargeurs also changed its \$10 surcharge to 10 percent, with a maximum of \$10 per payable ton, effective December 9, 1963. These charges are in effect at present.

The surcharges were imposed at the Port of Manila as a result of a strike and related labor difficulties which began during mid-1963. The strike primarily affected the port Arrastre Service at Manila. The Arrastre Service, in the Philippines, has the authority "to acquire, take over, operate and superintend such plants and facilities as may be necessary for the receiving, handling, custody and delivery of articles, and the convenience and comfort of passengers and the handling of baggage. . . ." The Arrastre assumes responsibility for the handling of cargo on the Manila piers. Cargo is delivered directly into the hands of the Arrastre who assume responsibility for movement on the pier, sorting, storing, and the ultimate delivery of the cargo to the consignee. The ship's responsibility ends at its tackle.

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The Arrastre has a history of both private and public ownership. Since 1962 it has functioned under the Bureau of Customs, but a plan has been formulated recently to return it to private enterprise.

During the middle of 1963, the port of Manila was prac-

tically closed by a strike primarily affecting the port Arrastre. The strike was accompanied by disorder and violence with a long-term disruptive effect on the port. The Arrastre strike of 1963 was precipitated by uncertainty of status of the Arrastre labor contract with the strike's intensity being later heightened by the jurisdictional issue between two labor factions. In May of 1963, longshoremen furnished by the contracting union struck. The Arrastre employed non-union labor subsequent to the outbreak of the strike which appears to have precipitated an outbreak of violence resulting in the damage and destruction of hilos and other pier equipment. This, in turn, contributed to cargo accumulation and slow discharge of vessels. The strike continued through the summer, and in October the port was virtually closed down in an effort to control sit-in strikes. The strike terminated late in October, but some unrest continued due to the labor jurisdictional issue. Similarly, pier congestion continued because of the lack of adequate pier equipment and lessened labor efficiency.

In considering the imposition of the surcharge the respondent conferences considered both the amount and applicability of the charges. The Pacific Westbound Conference originally proposed a surcharge of 25 percent of the basic freight rate and, pursuant to the terms of Agreement No. 8200 between the two conferences, sought concurrence from the Far East Conference. The Far East Conference refused concurrence on the ground that a percentage, when applied in a like amount by both conferences, would tend to upset the historical differential in basic rates which exist between the two conferences. Finally, the conferences agreed upon the \$10 per ton

figure.

Conferences in foreign-to-foreign trades also imposed surcharges on Manila-bound cargo. The Australian Con-

ference imposed a 25-percent surcharge, effective July 22, 1963; the Far Eastern Freight Conference of [4] London, and the Bay Bengal-Philippine Conference, imposed surcharges of 25 percent, effective August 1, 1963; the Malaya-China-Japan Conference, effective August 10, 1963, and the Hong Kong-Philippines Conference, effective August 23, 1963, imposed surcharges of 25 percent; and the Japan-Philippines Conference imposed a surcharge of \$2, effective December 1, 1963. The Australian Conference 25 percent surcharge was not in effect at the time of the hearing. The Far Eastern Freight Conference of London's 25 percent surcharge was reduced to 10 percent ef-

fective December 30, 1963.

In the weeks following the effective date of the surcharges, there was improvement in conditions at Manila. Delay due to congestion lessened and vessel turnaround time improved. While this improvement by the close of 1963 did not find a return to "pre-strike normalcy," respondents reduced their surcharges in December. In the late months of 1963 Philippine authorities attempted to clear congestion in Manila. Army trucks were used to clear cargo backlogs, bonded warehouses were employed for the storage of cargo not ordinarily put in bond, and some equipment was borrowed. Nevertheless, due to both the intensity of the Arrastre strike and to the disturbing effect of the strike's yet unsettled causes, the Port of Manila is currently (time of hearing) operating at less than a normal level of efficiency. This fact has resulted in the curtailment of service at that port on the part of some operators and in frequent abnormal delays for vessels calling there in recent months. Respondents are in no way a party to or themselves the cause of the present conditions in Manila and the result is to place upon them an additional element of cost for the performance of their Manila services.

Respondents have offered two cost justifications regarding the level of the surcharges. One concerns the time or rate of vessel discharge, and the other, total time spent in port. The time or rate of discharge approach is keyed to the "tons per gang hour" concept. This is the number of tons handled by each gang per hour that it is working, and is computed by dividing the total number of hours worked by each gang into the number of [5] tons discharged. While the rate of vessel discharge will vary extensively depending on the commodities involved, general cargo is being discharged at Manila at approximately half the rate that could be expected during a period of normalcy.1

The other statistical approach offered by respondents deals with the total time spent in the port of Manila for vessels arriving there in the several months before the hearing. In this connection respondents have shown that an unusually long amount of time is required for service in Manila.

The conferences set the initial surcharge of \$10 per ton at a level to compensate the carriers for out-of-pocket expenses incurred at Manila. Expenses among conference members, of course, vary; the selection of one level of reimbursement logically required a formula of average expense. Such a formula was used by the Far East Conference, being arrived at in the following manner: the daily cost for the operation of a conference vessel ranges from \$1500 to \$3600 with the average daily cost being \$2500. Four days' delay was considered the average at

¹ According to American President Line's experiences during 1960-1961, cargo moved at the rate of 8 or 9 tons; during the strike period of 1963 at 1 to 3 tons; and in November and December 1963 at 5 tons per gang hours. Pacific Far East Line agreed that before the strike the 12 tons rate was normal for discharging general cargo at Manila. The experiences of Chargeurs as to vessel discharge time varies from those of APL but the pattern is similar.

the time, making the cost for the average vessel \$10,000. This cost was passed on to cargo on the basis of the June 1963 conference carryings. During June, 28 conference vessels carried 29,000 tons of cargo to Manila, averaging approximately 1,000 tons per vessel. The average cost vessel, carrying the average tonnage of cargo, being delayed for an average period of time resulted in the determination that \$10 for each ton of cargo compensated costs.

The Pacific Westbound Conference used a similar formula showing that its average vessel carried roughly 800 tons to Manila; that it suffered roughly four days' delay over normal; that the average daily vessel cost was between \$2,000 and \$2,400, a figure representing a compromise [6] between low-cost vessels and American ships whose costs ran \$3,600 to \$4,800 per day; and that taking the lower average figure of \$2,000 per day, daily costs would be returned by a figure of \$10 per ton.

The reduction of the conference surcharges in December to \$5 per ton was not based upon a specific revaluation of costs but represented a 50 per-cent reduction on the basis of some port improvement.

Discussion

The presiding Examiner found that the surcharges were not contrary to the applicable provisions of the Shipping Act. He found that the surcharges were additional charges for service at Manila which reasonably approximated the additional cost of providing the service. Furthermore, he found that the form and the impact of the surcharges were not prejudicial to shipping interests in the United States. The Examiner concluded that the imposition of the surcharges was not violative of sections 15, 16, 17, and 18(b)(5) of the Shipping Act.

Hearing Counsel excepts on the ground that the form of the surcharge—the fixed dollar amount as opposed to a percentage form—is unlawful since it is prejudicial to shippers of low-valued, low-rated commodities. Hearing Counsel also excepts on the grounds that the application of the surcharge by Maersk Line and Pacific Star Line at Searsport, Maine, while no surcharge is applied at nearby Canadian ports is contrary to the provisions of sections 16, First and 17 of the Shipping Act.

Hearing Counsel did not except to the Examiner's finding that on the record the surcharges were justified because of port congestion or that the over-all revenue derived from the surcharges was a reasonable approximation of the cost incurred in calling at Manila. Neither did Hearing Counsel except to the Examiner's finding that there was no showing on this record that the different surcharges in different trades resulted in prejudice to American exporters. We adopt those findings to which no exception

has been taken.

The basic purpose behind surcharges such as those in issue here is to reimburse the carriers for additional costs temporarily incurred by [7] the performance of their service, and which costs the carriers are not recovering through their basic freight rates. It is not disputed that the overall revenue derived from a surcharge of \$10 per ton reasonably approximates the additional extraordinary cost for calling at Manila. The only question raised then is whether it is proper for shippers to be assessed on a tonnage basis rather than on a percentage of the freight rate. We feel that the surcharge, based upon a specific dollar amount per ton (weight or cube, as freighted) is a perfectly proper method of recouping the loss due to delay and congestion.

Nevertheless, Hearing Counsel argues that the form of the surcharge is prejudicial to low-rated commodities and

preferential to high-rated commodities. The argument has only superficial appeal, for it is premised upon the claim that the fixed dollar surcharge places an undue share of the cost of the delay on low-value, low-rated commodities. The record is quite to the contrary. The cost of the delay, which is admittedly recouped by the surcharge, is equally apportioned between all cargo. But Hearing Counsel submits that the surcharge is imposed without regard to "competitive quality, value, freight rate, handling or transportation characteristics." Therefore, they contend that low-rated commodities pay the cost of delay disproportionately high to its basic characteristics. the argument overlooks the fact that the charge is constructed on the most basic characteristic of cargo-weight or cube. In fact, many accessorial charges, including handling and wharfage, are levied on a per-ton basis without regard to freight rate, value, etc. Although freight rates may reflect value of the commodity, the rate at least equally reflects stowage factors. Considering that one type of cargo creates no more nor less delay than another, we think the fixed-dollar per-ton charge is fair.

Furthermore, the fixed-dollar per-ton surcharge does not violate Section 16, First, of the Act, because the requisite competitive relationship is not shown between high and low-rated cargo. There can be no undue or unreasonable preference or advantage to one and no undue or unreasonable [8] prejudice to another "person, locality, or description of traffic" absent a real competitive relationship between the one advantaged and the one disadvantaged. West Indies Fruit Co. v. Flota Mercante, 7 F.M.C. 66 (1962), Boston Wool Trade Association v. M. & M. T. Co., 1 U.S.S.B. 24, 30 (1921). In order to demonstrate unjust discrimination and undue prejudice, the evidence must "disclose an existing and effective competitive relation between the prejudiced and preferred

shipper, localities, or commodities . . ." Phila. Ocean Traffic Bureau v. Export S.S. Corp., 1 U.S.S.B. 538, 541 (1936). Our holding in West Indies, is controlling here:

Prejudice to one shipper to be unjust must ordinarily be such that it constitutes a source of positive advantage to another. Port of Philadelphia Ocean Traffic Bureau v. The Export S.S. Corp., et al., 1 U.S.S.B. 101 (1926). The competitive relationship is necessary not only to show the extent to which the complaining shipper was damaged by the alleged preference, prejudice or discrimination; its establishment is also necessary to prove the violation itself. American Peanut Corp. v. M. & M. T. Co., supra; Boston Wool Trade Assn. v. M. & M. T. Co., supra. (7 F.M.B. 66, 71-2)

Likewise, the form of the surcharge is not contrary to section 17. The record does not show that American exporters have been discriminated against in favor of foreign exporters or that the surcharge, in general, is unjustly discriminatory between shippers and ports. Consequently, we reject Hearing Counsel's argument that respondents have violated sections 16 and 17 by discriminating against low-rated in favor of high-rated commodities.

Hearing Counsel's exception to the Examiner's failure to find that the Maersk Line and Pacific Star Line violated section 17 by imposing the surcharge at Searsport, Maine, is, in part, well taken.

The Great Northern Paper Company is an exporter of paper and newsprint, competing with Canadian mills for the Philippine market. It has traditionally shipped its products from Searsport, Maine, where the surcharge is applicable. Canadian competitors, shipping from Eastern Canada, pay no surcharge in the Philippine trade. Newsprint is a low-rated commodity [9] with a small margin

of profit. During the first nine months of 1963, Great Northern shipped about 700 tons of newsprint a month but none was shipped in November and December. Since Great Northern can avoid the surcharge by utilizing Canadian ports and thus maintain a competitive position in the Philippines, it has embarked on a program of diverting newsprint from Searsport, Maine, and has now begun to export from the Canadian port of St. John. This diversion to Canada is not without some expense to Great Northern, and it deplores the inability of Searsport to handle this cargo. Great Northern's business is so competitive in the Philippines that it has not been able to pass on the entire surcharge to its customers, and it lost sales totaling about 1400 tons of paper in November and December 1963 that were made by Eastern Canadian mills.

These facts establish that Pacific Star Line and Maersk Line, by assessing a surcharge on newsprint at Searsport, Maine, while not at Canadian Atlantic ports, have unjustly discriminated against Great Northern and the port of Searsport while advantaging Canadian shippers of newsprint and the port of St. John. We find that a sufficient competitive relationship exists between the shippers and ports concerned; we find that Great Northern and the Port of Searsport have suffered pecuniary harm by the imposition of the surcharge and the resultant diversion of traffic, and we find that the transportation conditions are similar from St. John and Searsport. Pacific Star and Maersk, therefore, have demanded, charged, and collected a charge which is unreasonable. We find this conduct to be contrary to the provisions of section 17, which provides that "no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitiors."

West Indies Fruit Co. v. Flota Mercante, supra. Grays Harbor Pulp & Paper Co. v. A. F. Klaveness & Co., A/S 2 U.S.M.C. 366, 369 (1940). We will order these carriers to cease and desist from this unreasonable practice by removing the inequality of treatment between shippers and ports by appropriate tariff amendments.

[10]

ULTIMATE CONCLUSIONS

- 1. Respondents are justified in imposing a surcharge on cargo unloaded at the Port of Manila because of the extraordinary delay occasioned by labor difficulties and port congestion.
- 2. Respondents' surcharges, except as noted below, reasonably approximate the additional cost of serving the Port of Manila and are, therefore, not in violation of sections 15, 16, 17 and 18(b)(5) of the Shipping Act, 1916.
- 3. Respondents' surcharges, imposed on a fixed-dollar per-ton basis or on a percentage of the freight rate basis, are not unjust or unreasonable in violation of sections 16, First or 17 of the Shipping Act, 1916.
- 4. Respondents, Maersk Line and Pacific Star Line, by imposing a surcharge on newsprint at Searsport, Maine, while they do not apply a surcharge at St. John, New Brunswick, Canada, have demanded, charged, and collected a charge which is unjustly discriminatory between shippers and ports and unjustly prejudicial to exporters of the United States as compared with their foreign competitors contrary to section 17 of the Shipping Act, 1916.

An appropriate order will be issued.

By the Commission.

Thomas Lisi Thomas Lisi Secretary

Docket No. 1155

Commission's Order, Served February 3, 1965

[1]

[SAME TITLE]

ORDER

This proceeding having been initiated by the Federal Maritime Commission pursuant to Rule 5(g) of its Rules of Practice and Procedure, and the Commission having fully considered the matter and having this day made and entered of record a Report containing its findings and conclusions, which Report is hereby referred to and made a part hereof;

It is ordered, That respondents Maersk Line and Pacific Star Line cease and desist from assessing on newsprint moving from Searsport, Maine, to Manila, Republic of the Philippines, a surcharge which is prejudicial and discriminatory to exporters of newsprint from the United States and to the Port of Searsport, Maine;

It is further ordered, That respondents Maersk Line and Pacific Star Line shall notify the Commission within 15 days of the date of this order the manner in which they shall eliminate such prejudice and discrimination.

By the Commission.

Thomas Lisi Secretary

[1]

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 19,790

FAR EAST CONFERENCE, et al.,
Petitioners,

٧.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

I hereby certify that the following is a true and correct list of all the documents which constitute the entire record before the Federal Maritime Commission in the above-styled proceeding. These documents are and will be held in the custody of Thomas Lisi, Secretary, custodian of such records for the Federal Maritime Commission for and on behalf of the Clerk of the Court, pursuant to the provisions of Rule 38(g) of the Rules of the United States Court of Appeals for the District of Columbia Circuit.

In Witness Whereof, I have hereunto set my hand and caused the seal of the Federal Maritime Commission to be affixed on the 23rd day of December, 1965.

Thomas Lisi Secretary

[1]

DOCKET No. 1155

Imposition of Surcharge on Cargo to Manila, Republic of the Philippines

- 1. Notice of Investigation, dated October 23, 1963, 2 pages with 5-page appendix.
- 2. Notice of Assignment, dated November 20, 1963, 1 page.
- 3. Notice of Prehearing Conference, dated November 20, 1963, 1 page.
- 4. Prehearing Conference, November 26, 1963, 84 pages.
- 5. Request of Hearing Counsel for the Production of Data or Documents, dated November 22, 1963, 4 pages.
- 6. Petition to Intervene filed by the Philippine Government, dated November 13, 1963, 3 pages.
- 7. Permission to Intervene granted the Republic of the Philippines, dated November 22, 1963, 1 page.
- 8. Notice of Hearing, dated November 29, 1963, 1 page.
- 9. Notice to All Parties re Data or Documents, dated December 19, 1963, 1 page.
- 10. Notice of Postponement, and of Time and Places of Hearing, dated January 9, 1964, 1 page.
- 11. Statement of Positions with Respect to Willingness to Supply Information Called for by Hearing Counsel's Prehearing Requests, dated January 8, 1964, 3 pages.

- 12. Amended Order, dated January 17, 1964, 1 page.
- 13. Notice of Location of Hearing Rooms, dated January 27, 1964, 1 page.
- 14. Motion for Enlargement of Time, dated April 9, 1964, 2 pages.
- 15. Rescheduled Brief Due Dates, April 10, 1964, 1 page.
- 16. Seventeen subpenas.
- 17. Request for Enlargement of Time for the Filing of Hearing Counsel's Opening Brief, dated May 14, 1964, 1 page.

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- 18. Enlargement of Time for the Filing of Hearing Counsel's Opening Brief, dated May 18, 1964, 1 page.
- 19. Corrected Notice of Enlargement of Time for the Filing of Hearing Counsel's Opening Brief, dated May 19, 1964, 1 page.
- 20. Enlargement of Brief Dates, dated May 21, 1964, 1 page.
- 21. Opening Brief of Hearing Counsel, dated May 14, 1964, 51 pages.
- 22. Brief of Compagnie Maritime Des Chargeurs Reunis, dated June 2, 1964, 3 pages.
- 23. Brief of Pacific Westbound Conference, dated June 2, 1964, 63 pages, with Appendix A, 3 pages, and Appendix B, 2 pages.
- 24. Brief of Far East Conference, dated June 2, 1964, 16 pages, with 3-page Appendix.

- 25. Reply Brief of Hearing Counsel, dated June 16, 1964, 26 pages.
- 26. Motion to Introduce Late Filed Exhibit, dated May 15, 1964, 2 pages, with 1-page Exhibit.
- 27. Ruling on Motion to Admit Late Filed Exhibits, dated June 24, 1964, with 12 pages of photographs.
- 28. Initial Decision of A. L. Jordan, Examiner, dated June 29, 1964, 25 pages.
- 29. Request by Hearing Counsel for Enlargement of Time for Filing Exceptions, dated July 9, 1964, 2 pages.
- 30. Enlargement of Time for Filing Exceptions and Replies, dated July 17, 1964, 1 page.
- 31. Memorandum of Exceptions and Brief of Hearing Counsel, dated July 21, 1964, 14 pages.
- 32. Notice of Correction, dated July 23, 1964, 2 pages.
- 33. Reply to Exceptions of Hearing Counsel, dated August 3, 1964, 25 pages.
- 34. Reply of Far East Conference to Hearing Counsel's Exceptions, dated August 4, 1964, 11 pages, with 3-page Appendix.
- 35. Notice of Oral Argument, dated August 27, 1964, 1 page.

[3]

- 36. Allotment of Time at Oral Argument, dated September 24, 1964, 1 page.
- 37. Transcript of Oral Argument, September 30, 1964, 106 pages.

- 38. Report of the Commission, dated February 3, 1965, 10 pages, with 1-page Order attached.
- 39. Application for Enlargement of Time for Maersk Line to Notify the Commission of the Manner of Compliance, etc., dated February 11, 1965, 5 pages.
- 40. Order Denying Request for Extension of Time, February 19, 1965, 2 pages.
- 41. Transcript of Hearing, vols. I through X, from February 11, 1964, to February 28, 1964, pages 1-956a.

42. Exhibits:

Exhibits:	
No.	Subject
1-A thru 1-DD	Photographs.
2-A	Letter from Jose B. Lingad to Amelito Mutuc, dated January 17, 1964, 1 page.
2-B	Letter from Guillermo O. Orbos to the Commissioner of Customs, Manila Customhouse, January 16, 1964, 1 page.
2-C	Memo re strikes from F. G. Urgino, dated January 10, 1964, 2 pages.
2-D	Bureau of Customs, Department of Finance, Port Facilities, dated Janu- ary 10, 1964, 5 pages.
2-E	Comparative Data on Loading and Unloading of Ship in the Port of Manila for the Months of April, May, July 1963, 2 pages.

1	Vo.	Subject
2	2-F1	Comparative Data of Loading and Unloading of Ships in the Port of Manila for the Months of April, May, October, November and December 31, 1963, 2 pages.
2	2-F2	Comparative Data of Loading and Unloading of Ships in the Port of Manila for the Months of April, May, October, November and December 31, 1963, 2 pages.
2	2-F3	Comparative Data of Loading and Unloading of Ships in the Port of Manila for the Months of April, May, July, October, Nov., and December 31, 1963, 2 pages.
[4]		- 1 3
2	2-F4	Comparative Data of Loading and Unloading of Ships in the Port of Manila for the Months of April, May, October, November, and December 31, 1963, 2 pages.
2	2-F5	Comparative Data of Loading and Unloading of Ships in the Port of Manila for the Months of April, May, October, November, and December 31, 1963, 2 pages.
2	2-F6	Comparative Data of Loading and Unloading of Ships in the Port of Manila for the Months of April, May, July, October, November & December 31, 1964, 2 pages.

No.	Subject
2-G	Comparative Data on Loading and Unloading of Ships in the Port of Manila, 8 pages.
2-H	April 1963, Pier 13, 6 pages.
3	Page 123 from Part G., Luzon Pt. to Limit Pt., 6 pages.
4	Letter to Emilio S. Martinez from Robert J. Blackwell, dated December 13, 1963, 2 pages.
5	Letter to Mr. Arthur Foyer from Jose Uy, dated January 29, 1964, 2 pages.
6	Letter to Pamco Incorporated from Lim Se Keng, dated February 1, 1964, 1 page.
7	Memorandum to Association of International Shipping Lines, Inc., from E. H. Bosch, dated January 30, 1964, 1 page.
8	Letter to Pacific Westbound Conference from Dorward Trading Co., dated October 1, 1963, 1 page.
9	Letter to J. A. Dennean from R. N. Thayer, dated November 26, 1963, 1 page.
10	Letter to R. N. Thayer from J. A. Dennean, dated November 21, 1963, 1 page.

No.	Subject
11	Letter to J. A. Dennean from B. N. Thayer, dated November 20, 1963, 1 page.
[5]	Fagas
12	Telegram re strike, dated May 13, 1963, 1 page.
13	Letter to Pacific Westbound Conference, May 20, 1963, 1 page.
14	Telegram dated May 31, 1963, 1 page.
15	Telegram re surcharge, dated June 3, 1963, 1 page.
16	Telegram, dated June 7, 1963, 1 page.
17	Telegram re surcharge, dated June 11, 1963, 1 page.
18	Letter to Far East Conference from Manila Steamship Agents Association, dated June 21, 1963, 1 page.
19	Telegram re pier conditions, dated June 24, 1963, 1 page.
20	Circular No. 13, dated August 22, 1963, 7 pages.
21	Telegram re vessel time lost, dated September 17, 1963, 1 page.
22	Telegram re vessel time lost, dated September 25, 1963, 1 page.
23	Telegram re return to work agreement, dated September 30, 1963, 1 page.

No.	Subject
24	Telegram re strike labour court, dated October 14, 1963, 1 page.
25	Memorandum to Association of International Shipping Lines, Inc., dated October 14, 1963, 1 page.
26	Letter to Pacific Westbound Conference from D. J. Morris, dated October 15, 1963, 1 page.
27	Telegram re labour dispute, dated October 24, 1963, 1 page.
28	Memorandum to Association of International Shipping Lines, Inc., from E. H. Bosch, dated October 30, 1963, 1 page.
29	Memorandum to Association of International Shipping Lines, Inc., from E. H. Bosch, dated October 30, 1963, 1 page.
30	Memorandum to Association of International Shipping Lines, Inc., from E. H. Bosch, dated October 31, 1963, 1 page.
[6]	
31	Telegram re Manila waterfront, dated November 21, 1963, 1 page.
32	Letter to Pacific Westbound Conference from E. H. Bosch, dated November 22, 1963, 1 page.

No.	Subject
33	Newspaper article, December 9, 1963, 2 pages.
34	Letter re Manila surcharge, dated November 9, 1963, 1 page.
35	Letter re Circular Nos. 119 and 123, 3 pages.
36	Letter to E. H. Bosch to W. C. Galloway, dated December 5, 1963, 1 page.
37	Telegram re surcharge, December 11, 1963, 1 page.
38	Telegram dated January 24, 1964, 1 page.
39	Telegram dated January 29, 1964, 3 pages.
40	Arrival/Discharge Date of Vessels which Arrived Manila during November, 1963, 4 pages.
41	Arrival/Discharge Date of Vessels which Arrived Manila during December, 1963, 3 pages.
42	Commodity volume to Philippines, 3 pages.
43	Letter to Pacific Westbound Conference from General Steamship Corporation, Ltd., dated January 23, 1964, 3 pages.

No.	Subject
44	Letter to Pacific Westbound Conference from Transpacific Transportation Company, dated January 3, 1964, 1 page.
45	Letter to Transpacific Transportation Co., from Columbian Philippines, Inc., dated December 24, 1963, 1 page.
46	Letter to Transpacific Transportation Co. from Agsaysay Lines dated De- cember 23, 1963, 2 pages.
47	Letter from Association of Interna- tional Shipping Lines, Inc., 1 page.
[7]	
48	Memo to Association of International Shipping Lines, Inc., from E. H. Bosch, dated December 18, 1963, 2 pages.
49	Memo to Association of International Shipping Lines, Inc., from E. H. Bosch, dated December 13, 1963, 1 page.
50	Letter to W. C. Galloway from E. L. Bargones, dated February 3, 1964, 1 page.
50A	Chart showing discharge time, 1 page.
50B	Letter to Lillick Geary Wheat Adams & Charles from E. L. Bargones, dated February 11, 1964, 2 pages.
50C	Magsaysay Lines ships, 1 page.

No.	Subject
51	Letter to Pacific Westbound Conference from American Mail Line Ltd., February 12, 1964, 2 pages.
52	Newspaper article dated December 23, 1963, 1 page.
53	Telegram re strike, dated May 20, 1963, 1 page.
54	Telegram re strike, July 8, 1963, 1 page.
5 5	Telegram re strike, July 10, 1963 1 page.
56	Inter-office memo to Clay Miller from L. Q. Haven, Jr., dated July 12, 1963, 1 page, with 1-page attachment.
57	Inter-office memo to H. B. Luckett from L. Q. Haven, Jr., dated July 22, 1963, 5 pages.
58	Letter to Rodrigo Perez, Jr., from Association of International Shipping Lines, Inc., dated July 26, 1963, 2 pages.
59	Inter-office memo to H. B. Luckett from S. P. Healey, dated August 9, 1963, 2 pages.
60	Telegram re strike, dated August 13, 1963, 1 page.

No.	Subject
61	Inter-office memo to H. B. Luckett from S. P. Healey, dated August 13, 1963, 1 page, with two newspaper arti- cles attached.
62	Telegram re strike, dated August 14, 1963, 1 page.
[8]	
63	Telegram re strike, dated August 14, 1963, 1 page.
64	Inter-office memo to H. B. Luckett from S. P. Healey dated August 21, 1963, 1 page.
65	Newspaper article.
66	Telegram re strike, dated September 5, 1963, 1 page.
67	Telegram re strike, date October 15, 1963, 1 page.
68	Letter to P. Keeler from E. C. Morris, dated October 17, 1963, 1 page, with newspaper clippings.
69	Telegram re strike, dated October 28, 1963, 1 page.
70	Letter to P. J. Keeler from E. C. Morris, dated November 22, 1963, 1 page with newspaper clipping.
71	Telegram re port situation, dated November 22, 1963, 1 page.

No.	Subject
72	Inter-office memo to C. Miller from E. C. Morris, dated February 15, 1964, 1 page, with newspaper clipping.
73	Letter to S. G. Holmes from Clay Miller, dated February 10, 1964, 3 pages.
74	Letter to N. M. Brinson from Clay Miller, dated October 4, 1963, 2 pages.
75	Inter-office memorandum to Clay Miller from Noah M. Brinson, dated October 15, 1963, 1 page.
76	Inter-office memo to Clay Miller from S. P. Healey, dated November 11, 1963, 1 page.
77	Letter to S. P. Healey from Clay Miller, December 17, 1963, 1 page.
78	Chart dated April 1—December 31, 1963, 1 page.
79	Schedules of American President Lines, Ltd., ships, 23 pages.
80	Letter to Pacific Westbound Conference from American President Lines, dated January 24, 1964, 2 pages.
[9]	
81	Schedule of GOLDEN BEAR, 1 page.
82	Schedule of CHINA BEAR, 1 page.
82A-82R	Manila Discharge schedules, 18 pages.

No.	Subject
83	Telegram, dated February 10, 1964, 1 page.
84	Letter to G. J. Gmelch from United States Line, dated February 5, 1964, 2 pages.
85	Telegram dated January 23, 1964, 1 page.
86	Telegram dated October 8, 1963, 1 page.
87	Letter to G. J. Gmelch from United States Lines, dated October 14, 1963, 1 page, with newspaper clippings en- closed.
88	Telegram, dated October 14, 1963, 1 page.
89	Telegram, dated October 15, 1963, 1 page.
90	Telegram, dated October 25, 1963, 1 page.
91	Letter to G. J. Gmelch from Pacific Far East Line, dated November 9, 1963, 2 pages.
92	Telegram re pier situation, 1 page.
93	Telegram, dated November 16, 1963, 1 page.
94	Telegram, dated November 22, 1963, 1 page.

No.	Subject
95	Letter from E. H. Bosch, 2 pages.
96	Withdrawn.
97	Letter from E. H. Bosch, 1 page.
98	Letter to G. J. Gmelch from F. J. Olemo, dated December 18, 1963, 1 page.
99	Schedule of President McKinley, 1 page.
100	Schedule of President Harrison, 1 page.
[10]	
101	Schedule of CHINA BEAR, 1 page.
102	Schedule of Japan Bear, 1 page.
103	Schedule of Korea Bear, 1 page.
104	Schedule of Philippine Bear, 1 page.
105	Chart re Manila Surcharge, 1 page.
106	Telegram re port congestion, 1 page.
107	Telegram re port congestion, 1 page.
108	Letter to Pacific Westbound Conference from States Steamship Company, dated January 24, 1963, 3 pages.
109	Telegram dated December 19, 1963, 1 page.
110	Telegram dated December 19, 1963, 1 page.

No.	Subject
111	Telegram dated February 13, 1964, 1 page.
112	Letter to Maritime Administration from G. S. Koons, dated November 22, 1963, 2 pages.
113	Klaveness Line chart, 1 page.
114	Interoffice Correspondence, Overseas Shipping Company, 3 pages.
115	Telegram re port conditions, 1 page.
116	Shipments Effected to Manila from Searsport during 1963, 3 pages.
117	Letter to Far East Conference from J. V. Carena, dated February 18, 1964, 2 pages.
118	Calls and Tonnages Discharged at Manila by CR Lines Vessels 1962 through January, 1964, 2 pages.
119	Far East Conference—Carryings to the Republic of the Philippines, 1 page.
120	Far East Conference, Comparison between April-December 1962 etc., 1 page.
121	Newspaper clipping, 1 page.
122	Newspaper clipping, 3 pages.

Certification of the Record by the Federal Maritime Commission

[11]

DOCKET No. 65-29

IMPOSITION OF SURCHARGE BY THE FAR EAST CONFERENCE AT SEARSPORT, MAINE

- 1. Order to Show Cause, dated August 11, 1965, 3 pages with 2-page appendix.
- 2. Petition for Leave to Intervene, dated August 18, 1965, 2 pages.
- 3. Memorandum of the Far East Conference in Response to Order to Show Cause, dated August 20, 1965, 21 pages with 5-page affidavit.
- 4. Permission to Intervene, dated August 24, 1965, 1 page.
- 5. Reply of Hearing Counsel to Memorandum of Respondent Far East Conference, dated September 8, 1965, 22 pages with 6-page affidavit.
- 6. Oral Argument, dated September 16, 1965, 116 pages.
- 7. Report by the Commission, dated November 5, 1965, 20 pages.
- 8. Order, dated November 5, 1965, 2 pages.

[1]

FEDERAL MARITIME COMMISSION

Docket No. 65-29

Imposition of Surcharge by the Far East Conference at Searsport. Maine

In Docket No. 1155, Imposition of Surcharge on Cargo to Manila, Republic of Philippines, February 3, 1965, the Commission found that respondent Maersk Line, by imposing a surcharge on newsprint at Searsport, Maine, and by failing to apply a surcharge at St. John, New Brunswick. Canada, has demanded, charged, and collected a charge which is unjustly discriminatory between shippers and ports and unjustly prejudicial to exporters of the United States as compared with their foreign competitors contrary to section 17 of the Shipping Act, 1916. Based upon this finding, the Commission ordered Maersk to cease and desist from assessing on newsprint moving from Searsport, Maine to Manila, a surcharge which is prejudicial and discriminatory to exporters of newsprint from the United States and to the Port of Searsport. Maersk was ordered to notify the Commission within 15 days of the date of the order (February 3, 1965) of the manner in which it would eliminate such prejudice and discrimination.

Thereafter, Maersk applied for an enlargement until April 19, 1965, within which they must comply with the order. On February 19, 1965, the Commission denied the request and Maersk was again directed to end the discrimination. Upon application of the Commission to the United States District Court for the Southern District of New York, Maersk was directed to show cause why an

order should not be made by the District Court pursuant to section 29 [2] of the Shipping Act to enforce obedience by Maersk to the Commission's order of February 3, 1965. In subsequently ruling upon that order to show cause, the District Court refused to enter an injunction against Maersk on two grounds: (1) That Maersk was not serving Searsport and, therefore, it was not necessary that it change a rate applicable at that port, and (2) That Maersk, having on three occasions petitioned the Far East Conference to eliminate the Searsport surcharge in order to allow Maersk to comply with the order, and was not permitted by the conference to make the change, could not comply with the order.

The Commission is of the opinion that immediate steps should be taken to end the discrimination against exporters through the Port of Searsport and against that port itself.

THEREFORE, IT IS ORDERED, That the Far East Conference pursuant to sections 15 and 22 of the Shipping Act show cause why Agreement No. 17 should not be amended to remove the Port of Searsport from the trading range of the conference because the applicable tariffs of the conference result in a situation which is detrimental to the commerce of the United States, contrary to the public interest, and otherwise in violation of the Shipping Act. This proceeding shall be limited to the submission of affidavits and memoranda, replies thereto, and oral argument. Affidavits of fact and memoranda of law shall be filed by the conference no later than close of business August 23, 1965. Replies shall be submitted by Hearing Counsel and interveners, if any, no later than close of business September 8, 1965. An original and 15 copies of such affidavits of fact and memoranda of law, and replies thereto, are [3] required and must be addressed to the Secretary, Federal Maritime Commission, Washington, D. C. 20573.

Copies of any papers filed with the Secretary should also be served upon all parties hereto. Oral argument will be heard at 9:30 A.M., September 16, 1965, in Room 114, 1321 H Street, N. W., Washington, D. C.

IT IS FURTHER ORDERED, That the Far East Conference and the member lines thereof as indicated in Appendix "A" attached hereto are hereby made respondents in this proceeding.

IT IS FURTHER ORDERED, That this order be published in the Federal Register and a copy of such order be served upon each respondent.

Persons other than respondents and Hearing Counsel who desire to become a party to this proceeding shall file a petition for leave to intervene in accordance with Rule 5(n) [46 CFR § 201.74] of the Commission's Rules of Practice and Procedure no later than close of business August 19, 1965, with copy to respondent Far East Conference.

By the Commission.

Thomas Lisi Thomas Lisi Secretary

(SEAL)

APPENDIX A TO ORDER TO SHOW CAUSE, SERVED AUGUST 11, 1965

[4]

FAR EAST CONFERENCE (17) J. A. DENNEAN, Chairman

Room 760 11 Broadway

Member Lines:

New York, N.Y. 10004

American President Lines, Ltd. 601 California Street, San Francisco, California

Fern-Ville Lines—Fearnley & Eger and A. F. Klaveness & Co., A/S Fearnley & Eger, Inc., General Agents

39 Broadway-New York 6, New York

Isthmian Lines, Inc.

States Marine-Isthmian Agency, Inc. 90 Broad Street—New York 4, New York

Japan Line, Ltd.

A. L. Burbank & Co., Ltd., Agents 120 Wall Street—New York 5, New York

Kawasaki Kisen Kaisha, Ltd., Kerr Steamship Company, Inc., General Agents 51 Broad Street, New York 4, New York

Lykes Bros. Steamship Co., Inc. 821 Gravier Street—New Orleans 12, Louisiana

Maritime Company of the Philippines, Inc.
North American Maritime Agencies, General Agents
26 Broadway—New York 4, New York

Mitsui O.S.K. Lines, Ltd. 17 Battery Place—New York 4, New York

FAR EAST CONFERENCE (17) (Continued)

Member Lines:

A. P. Moller-Maersk Line 67 Broad Street—New York 4, New York

Nippon Yusen Kaisha, Ltd. 25 Broadway—New York 4, New York

States Marine Lines 90 Broad Street—New York 4, New York

United Philippine Lines, Inc. Stockard Shipping Co., Inc., General Agents 17 Battery Place—New York 4, New York

[5]

United States Lines Company (American Pioneer Line) One Broadway—New York 4, New York

Wilh. Wilhelmsen Interests
Barber Steamship Lines Inc., Agents
17 Battery Place—New York 4, New York

Yamashita-Shinnihon Steamship Co., Ltd. Texas Transport & Terminal Co., Inc., Agents 52 Broadway—New York 4, New York

[1]

[SAME TITLE]

STATEMENT OF THE CASE

On August 11th, 1965, the Commission served by mail an order to the Far East Conference (hereinafter, "FEC"), to show cause why its Conference Agreement (FMC Agreement No. 17) should not be amended further to remove the port of Searsport from the "trading range of the Conference because the applicable tariffs of the conference result in a situation which is detrimental to the commerce of the United States, contrary to the public interest, and otherwise in violation of the Shipping Act." In the recitals preceding the order, reference is made to the Commission's determination in Docket No. 1155, Imposition of Surcharge on Cargo to Manila, Republic of the Philippines, that a single respondent therein, Maersk Line, by imposing a surcharge on a single item, newsprint, at Searsport, Maine, and by failing to apply a surcharge at St. John, New Brunswick, Canada, had violated §17 of the Shipping Act, and to [2] the Commission's order in Docket No. 1155 directing Maersk Line alone, of all the numerous Conference members respondents in that proceeding, to cease and desist from assessing on newsprint moving from Searsport, Maine, to Manila, a surcharge which is prejudical and discriminatory to exporters of newsprint from the United States and to the port of Searsport. The recitals in the Order to Show Cause mention the Commission's defeat in its effort, in the United States District Court for the Southern District of New York.

to obtain an order of the Court enforcing against Maersk, the Commission's order in Docket No. 1155 because it had not been shown that Maersk violated the Commission's order.

The Order to Show Cause does not mention that in Docket No. 1155 not only Maersk Line, but all other members of the FEC and of the Pacific Westbound Conference, as well as several non-Conference carriers, were named as respondents, or that the stated purpose of Docket No. 1155 was to determine whether surcharges imposed by the respondents in that proceeding on cargo moving from ports in the United States to Manila, violated §§15, 16, 17, or 18(b)(5) of the Shipping Act. The Order to Show Cause does not mention that full evidentiary hearings were held in Docket No. 1155 in both San Francisco and New York. The Order to Show Cause does not mention that on the full evidentiary record, and on exceptions to a Commission examiner's Initial Decision. the Commission in Docket No. 1155 made "ultimate conclusions" as follows:

[3]

- "1. Respondents are justified in imposing a surcharge on cargo unloaded at the Port of Manila because of the extraordinary delay occasioned by labor difficulties and port congestion.
- "2. Respondents' surcharges, except as noted below, reasonably approximate the additional cost of serving the Port of Manila and are, therefore, not in violation of sections 15, 16, 17 and 18(b)(5) of the Shipping Act, 1916.
- "3. Respondents' surcharges, imposed on a fixed-dollar per-ton basis or on a percentage of the freight

rate basis, are not unjust or unreasonable in violation of sections 16, First or 17 of the Shipping Act, 1916.

"4. Respondents, Maersk Line and Pacific Star Line, by imposing a surcharge on newsprint at Searsport, Maine, while they do not apply a surcharge at St. John, New Brunswick, Canada, have demanded, charged, and collected a charge which is unjustly discriminatory between shippers and ports and unjustly prejudicial to exporters of the United States as compared with their foreign competitors contrary to section 17 of the Shipping Act, 1916.

"An appropriate order will be issued."

The Order to Show Cause does not mention a single matter of fact which was not in evidence in Docket No. 1155, except the fact that the Commission made a futile effort to obtain from a court an enforcement order against Maersk Line, notwithstanding that the Commission had no evidence that Maersk had violated the order in Docket No. 1155.

The plain inference is that the present proceeding was conceived in vindictiveness and dedicated to harassment. The inference is supported by the short time within which FEC is called upon to furnish affidavits and memoranda responding to matters of fact and law, which are neither matters of fact nor law, by the [4] lack of any opportunity afforded to FEC to make written response to the affidavits and memoranda of Hearing Counsel and intervenors, if any—Hearing Counsel's data being presumably the first intimations which will be given of any factual basis for the incredible amendment suggested in the order, and by the inappropriate title to the proceeding—there being no surcharge imposed by FEC at Searsport, Maine.

ARGUMENT

I. THE ORDER TO SHOW CAUSE IS CONTRARY TO THE SHIP-PING ACT, AND VIOLATES THE ADMINISTRATIVE PROCE-DURE ACT.

The order recites no fact not already adjudicated by the Commission favorably to FEC which would form the basis for a finding that the FEC tariff results in a "situation" which is detrimental to the commerce of the United States, contrary to the public interest, and otherwise in violation of the Shipping Act, in any manner which would be relieved by deleting Searsport, Maine, from the range of loading ports covered by the FEC tariff. Certainly the Commission's unsuccessful suit against Maersk is not a violation of the Shipping Act by FEC. Accordingly, the Order to Show Cause attempts to put on FEC the burden of showing that there are no facts which, by reason of the inclusion of Searsport within the range of ports covered by the Conference tariff, render the Conference Agreement detrimental to the commerce of the United States, contrary to the public interest, or otherwise in violation of the Shipping Act. It would appear that the teaching of Aktiebolaget Svenska Amerika Linien, et al. [5] v. Federal Maritime Commission, et al. (decided by the Court of Appeals for the District of Columbia Circuit on June 10th, 1965), 4 Pike & Fischer SRR 20813, was lost upon the draftsmen of the Order to Show Cause. Ab Svenska arose on review of a Commission decision in which portions of an agreement were disapproved on the basis of the Commission's concept of United States antitrust policy, and not on the basis of findings predicated on substantial probative evidence and specified in §15 of the Shipping Act as prerequisite to an order of disap-

proval. Vacating the Commission's order and remanding the cause to the Commission, the Court said (4 Pike & Fischer SRR 20820-1):

"We do not read the statute as authorizing disapproval of an agreement on the ground that it runs counter to antitrust principles, the theory on which seemingly the Commission's disapproval rests here. Many of the matters covered by conference rules are restrictive and even monopolistic in tendency. Yet, if the agreement is approved under 46 USC §814, an exemption from the antitrust laws is specifically given by that section. The statutory language authorizes disapproval only when the Commission finds as a fact that the agreement operates in one of the four ways set out in the section by Congress. See the dissent of Commissioner Patterson, joined by Commissioner Day on this point, emphasizing that the need for the rule from a competitive standpoint has not been made a standard for approval or disapproval by the statute.

"Since there is no finding here that the tieing rule operates in any one of the four ways which Congress prescribed in 46 USC §814 for disapproval, we must return the case to the Commission. Such a finding is not for us to make. Accordingly, we remand for the purpose of reconsideration, with directions that either an adequately supported ultimate finding be made which warrants disapproval under the statute, or if no such finding can be made on the record, that the tieing rule be approved as directed by 46 USC §814."

The Court of Appeals thus confirmed what is obvious [6] from the plain language of §15. Agreements must be approved unless they are found to operate in any one of the four ways which Congress prescribed in §15 for dis-

approval. It follows that, in the absence of any evidence at all, no one of the four findings can be made and approval must be granted and disapproval may not be ordered. This is exactly the reverse of the concept of an order to a Conference to show why its Agreement should not be disapproved, canceled, or modified. Under Ab Svenska the proper approach is an order for the Commission to show cause why the Agreement should not continue to enjoy approval.

What we have said above deals with approval and disapproval. The same remarks apply to an attempt of the Commission to "amend" or modify an agreement. Exactly the same prerequisite findings are specified in §15, and §15 equally directs that the Commission, "shall approve all other agreements, modifications or cancellations" (em-

phasis supplied).

It thus appears that the entire conception of this proceeding is contrary to the terms of §15 of the Shipping Act, and to the judicial interpretation of that section recently announced by the United States Court of Appeals for the District of Columbia Circuit.

Furthermore, the proceeding is procedurally defective. Section 5(a) of the Administrative Procedure Act (hereinafter, "APA"), prescribes that persons entitled to notice of an [7] agency hearing, "shall be timely informed of • • • (3) the matters of fact and law asserted. • • • In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives." Section 7(c) of APA provides that, "Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. • • • Every party shall have the right to present his case or

¹ Section 15 specifies no circumstances under which the Commission may "amend" an agreement.

defense by oral argument or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of

the facts." (Emphasis supplied.)

The Order to Show Cause gives no notice of any relevant matters of fact and law. It refers to the recently concluded Docket No. 1155 in which the Commission held that the FEC surcharge to Manila does not violate any cogent section of the Shipping Act. The only other matters of fact of which the respondents are notified by the Order to Show Cause relate to the attempted court enforcement of the order in Docket No. 1155 against Maersk Line, and the failure of that attempt because Maersk had not violated The Order to Show Cause incorrectly states that Maersk could not comply with the order by reason of the refusal of FEC to eliminate the Manila surcharge with respect to cargo originating at Searsport (incorrectly referred to as a refusal "to eliminate the Searsport surcharge"). The correct fact is that Maersk has successfully complied with the order in Docket No. 1155 by not serving the trade from Searsport [8] to Manila.

Not only is the Order to Show Cause devoid of notice of any relevant facts asserted, but it also establishes a procedure which requires FEC to file its affidavits of fact and memoranda of law before the Commission's counsel furnishes his affidavits of fact and memoranda of law, and it provides no opportunity for FEC to reply to matters of

fact and law asserted by Commission counsel.

The Order to Show Cause thus contravenes the express requirements of §5(a) of APA regarding notice. It also takes no account of the convenience of FEC and its representative in fixing the times for the filing of documents and oral argument. FEC will not even know who, if any, are the intervenors until after its single opportunity to

file papers in the proceeding has elapsed. Entirely apart from that denial of plain justice, the time permitted for FEC to prepare its affidavits and memoranda on a matter of great importance and involving complex factual and

economic situations is utterly inadequate.

We have pointed out previously that the Order to Show Cause imposes a burden on FEC to establish the facts contrary to the thrust of §15 of the Shipping Act. For the same reason, the Order to Show Cause violates §7(c) of APA. FEC certainly is not the proponent of any rule or order in this proceeding. It is the Commission which proposes an order requiring the amendment of Agreement No. 17. Accordingly, under §7(c) of APA, and indeed, under Rule 10(o) of the Commission's Rules of Prac-[9] tice and Procedure, the burden of proof in this proceeding is on the Commission and not on FEC. Yet the Order to Show Cause is rigged in such a way as to attempt to cast the burden of proof upon FEC.

The Order to Show Cause is further defective under \$7(c) of APA in that it affords no opportunity to FEC to submit rebuttal evidence. The sequence of proceedings established by the Order to Show Cause provides only for oral argument after the submission of Hearing Counsel's reply affidavits and memoranda. Oral argument by counsel is no substitute for the production of evidence. It may also be noted that, whereas Hearing Counsel are allowed 16 days to reply to the FEC filings, the oral argument is scheduled only 8 days after Hearing Counsel's filings.

Finally, as hereinabove noted FEC is afforded no opportunity whatsoever to submit rebuttal evidence and, since the proceedings are directed to be held on affidavits, FEC is foreclosed from the opportunity guaranteed by APA to conduct cross-examination as may be required for a full and true disclosure of the facts.

Since §15 authorizes the Commission to issue an order of disapproval or modification of an agreement only, "after notice and hearing", and upon the making of certain findings, and since §\$5 and 7 of APA govern, "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing", the Order to Show Cause is fatally defective.

[10]

The exception to the above principles which may be applicable in cases where there is notice of relevant facts and there is no genuine dispute of any material fact, cannot apply here. As will appear below, the facts germane to a question of unlawful discrimination against a port or a shipper are numerous and complex. They are utterly unsuited to development by way of affidavits and without the benefit of crossexamination.

II. As a Matter of Law, FEC Cannot Be Held to Discriminate Against the Port of Searsport, Maine, By Reason of Rates Applicable from St. John, New Brunswick, Canada.

In order to find that FEC is unjustly discriminating against exporters through the port of Searsport and against the port of Searsport, the Commission must have evidence and find that FEC is treating competitive exporters and a competitive port or ports more favorably than it is treating Searsport and without justification for the difference in treatment. The Order to Show Cause contains no suggestion that FEC is treating any Atlantic or Gulf Coast port of the United States or the exporters through it any more favorably than it is treating Searsport. There would be no basis for any such suggestion

since FEC rates and its surcharge on cargo destined to Manila apply equally at all United States Atlantic and Gulf Coast ports of loading.

The comparison which the Order to Show Cause intimates is between the FEC rate and surcharge applicable to cargo loaded at United States Atlantic and Gulf ports, including Searsport, and destined to Manila, on the one hand, and on the other, the rate without any surcharge applied by Maersk Line for [11] cargo loaded at St. John, New Brunswick, Canada, and destined to Manila.

Agreement No. 17 authorizes FEC to establish the rates which its member lines will charge from United States Atlantic and Gulf ports to numerous Far Eastern destinations, including Manila. It does not authorize FEC to establish rates and charges or surcharges which its member lines must observe from St. John or any other loading port outside of the United States to any Far Eastern destination. FEC has never taken any step to govern or attempt to govern the tariffs of any of its member lines applicable in trades outside the scope of the FEC Agreement, i.e., Agreement No. 17.

The principle that a carrier or a group of carriers cannot be held to have discriminated in rates between two points unless it controls or effectively participates in the establishment of rates for service at both of those points, was formally established in Texas & Pacific Ry. Co. v. United States, 289 U.S. 627 (1933). There, certain railroads had been charged with discrimination in favor of the port of New Orleans and against certain Texas port cities because rail rates from certain inland points to New Orleans were lower than rail rates from the same points to the Texas ports, although the distance to New Orleans was greater. The ICC had held all of the railroad respondents guilty of unjust discrimination even though

certain of them had no effective participation in the making of the rates to the Texas ports. It may be noted (289 U.S. at 646) that the ICC, af- [12] ter several considerations of the question, had exempted the lines participating in the rates only to New Orleans from its order against the discrimination, "pursuant to a rule which the Commission had consistently followed since its organization: namely, that a carrier may not be held responsible for undue prejudice or preference unless both of the localities affected are upon its lines, or it effectively participates in the rates to both." However, in its final report, the ICC denied exemption to any of the railroad carriers (289 U.S. 646-7), "under the belief that this court had held the principle inapplicable in the circumstances here disclosed."

The Supreme Court upheld the contention of the two railroads seeking exemption from the order, and stated, in its most general terms, the principle which governs the

present proceeding (289 U.S. at 649-50):

The reason for the doctrine is that preference or prejudice can be found only by a comparison of two rates. If these are the rate of one carrier to point A and that of another to point B while a relationship of one to the other may be determined neither the first nor the second carrier alone can be held to have created the relation. Assuming that neither rate is unreasonable, the one carrier cannot be compelled to alter its rate, because the other's is higher or lower for the same service. A carrier or group of carriers must be the common source of the discrimination—must effectively participate in both rates, if an order for correction of the disparity is to run against it or them. Where an order is made under §3 an alternative must be afforded. The offender or offenders

may abate the discrimination by raising one rate, lowering the other, or altering both. • • • The situation must be such that the carrier or carriers if given an option have an actual alternative.

"The principle has been approved in decisions of [13] this court with respect to practices, * * * and rates, * * *." (Emphasis supplied.)

Again (289 U.S. at 654-5) the Court said:

"We find nothing in any of the decisions which renders inapplicable the principle upon which the Commission has acted, with the approval of this court, for more than forty years in the administration of §3, and conclude that the New Orleans lines could not properly be held guilty of unjust discrimination against the Texas ports in the absence of a finding of effective participation in the rates to them."

This logical principle was applied by the Commission's predecessor in *Terminal Charges at Norfolk*, 1 U.S.S.B.B. 257, 358 (1935), where the Department of Commerce held that parties to a terminal agreement could not be found to have discriminated by reason of their charging higher terminal rates than were charged by other terminals. The Department said:

"• • • As the parties to the agreement are not in any way connected with and do not exercise any control over the terminals at which lower charges are assessed, no discrimination is attributable to them so long as they uniformly apply at their own terminals the charges covered by their agreement."

Since FEC uniformly applies the surcharge to Manila to all items of traffic originating at all ports within the

Atlantic and Gulf Coasts of the United States, and since FEC in no way participates in, and certainly does not control, the making of rates or application of surcharges on cargo loaded at St. John, New Brunswick, Canada, to any destination, it cannot possibly be held that FEC or Agreement No. 17 unjustly discriminates against or unduly prejudices the port of Searsport or any cargo loaded at Searsport by reason of a comparison between the charges [14] made by FEC at Searsport and the charges made by others than FEC at St. John. It may be noted that in Docket No. 1155, Hearing Counsel on exceptions to the Initial Decision, argued that FEC should be required to discontinue its surcharge at Searsport because of the Maersk Line situation. The Commission correctly rejected this course in Docket No. 1155. That course is no more justified today than it was when the order in Docket No. 1155 was made. A fortiori is the action suggested in the Order to Show Cause completely unwarranted by any principle.

III. EVEN IF IT COULD, AS A MATTER OF LAW, BE HELD THAT THE FEC MANILA SUBCHARGE APPLIED AT SEARSPORT IS UNJUSTLY DISCRIMINATORY, SUCH A HOLDING WOULD REQUIRE FACTUAL DETERMINATIONS WHICH CANNOT BE MADE IN A SHORT-NOTICE PROCEEDING ON AFFIDAVITS.

In West Indies Fruit Co. v. Flota Mercante, Docket No. 927 (January 22nd, 1962), 1 Pike & Fischer SRR 433, 437, 438a, the Commission had occasion to state the ultimate findings prerequisite to a conclusion that there has been unjust discrimination between shippers and between ports.

In both instances, the Commission cited and relied upon a consistent line of administrative determinations going back to 1921. The result of West Indies Fruit Co., and the cases cited therein, is that the holding of unjust discrimination must be clearly demonstrated by substantial proof that the difference in rates complained of is undue and unjust and actually operates to the competitive disadvantage of the complainant and the advantage of one similarly situated and competitive with the complainant; and this proof [15] must rest on evidence of the specific effect of the rates on the flow of traffic concerned, and on the marketing of the commodities involved. Finally, there must be a showing that the alleged prejudice is the proximate cause of the disadvantage.

As we have previously stated in Docket No. 1155 where the Commission felt that it had sufficient evidence to warrant a finding that Maersk Line had discriminated against Searsport, it also felt that the evidence warranted the ultimate conclusion that the FEC surcharge to Manila was "not in violation of sections 15, 16, 17 and 18(b)(5) of the Shipping Act, 1916". As was stated in the dissenting opinion on reconsideration of Docket No. 1059, North Atlantic W/B Freight Ass'n-Dual Rate Contract (January 29th, 1965), 5 Pike & Fischer 777, 780, finality to adjudication is most desirable not only in judicial but in administrative quasi-judicial preceedings. Unless there is a showing of circumstances which would make inapplicable the reasoning and conclusions of an earlier decision on the same point, there should be no reopening of the issue. Here, there clearly has been no showing of any new circumstances, except that Maersk Line has bowed to a questionable order in Docket No. 1155 to the extent of not serving Searsport.

The burden of showing similarity of conditions and competitive relationship, and proximately caused preference and prejudice in this proceeding, would be on the Commission not on FEC since FEC is not the proponent of any rule or order. Even if we wished to assume the burden we could not, in the time per- [16] mitted and in the form of affidavits, come forward with proof that the necessary ingredients for a holding of unjust discrimination are lacking. Equally is it true that the Commission cannot accept as the basis for findings and an order any affidavits which Hearing Counsel or intervenors, if any, may produce, without the right accorded to FEC to cross-examine on these complex issues.

To the extent that time has permitted, we have produced facts, all of which militate against the action which

the Order to Show Cause suggests.

Annexed hereto is the affidavit of Mr. James A. Dennean, Chairman of the Far East Conference, sworn to

August 20th, 1965.

As appears from paragraphs 2 and 3 of Mr. Dennean's affidavit, throughout the history of the present Agreement No. 17, dating back to November, 1922, all United States Atlantic and Gulf ports have been included as loading ports within the scope of the FEC, and have received equal treatment so far as concerns rates to all Far Eastern destinations within the scope of the Conference. This parity of rates has put all ports on these coasts on an equal position so far as ocean freight rates are concerned in their competition to serve as gateways for United States commerce to the Far East. Compulsory elimination of any one of these ports from the scope of the Conference might have either of two results for that port, depending upon the circumstances. If it is a port which normally

generates enough Far [17] East export cargo to warrant regular calls, the member lines would be relieved of their obligation to adhere to Conference tariff rates at that port and would doubtless engage in cut-rate competition there. It requires little imagination to hear the howls of outrage which would soon emanate from adjoining ports. If the Commission should, in response to complaints, eliminate each successive port injured by the elimination of its neighbor from the FEC Agreement, the destruction of the Conference would be inevitable.

If, on the other hand, the eliminated port is one which does not attract regular calls, it is likely that the member lines, if they are free of the Conference tariff at that port, will seek to extract higher rates at that port as an inducement to divert their vessels to call there when they could be readily filled at principal ports.

In either event, the elimination of a port from a coastal range covered by the Conference Agreement will almost inevitably upset the competitive parity which exists when the entire range of ports in included.

Paragraph 4 of Mr. Dennean's affidavit sets forth the Conference carryings of newsprint paper to the Philippines for the years 1961-1964, and for the period January-May, 1965. As appears from these statistics, the total carryings fell by nearly 50% from 1961 to 1962, and declined further, principally from the Gulf, in 1963. The surcharge to Manila did not become effective until November, 1963. Nevertheless, during 1964, when [18] the surcharge was applicable during the entire year, the total carryings increased slightly. It may be noted that during 1964, carryings from the Atlantic Coast increased, while carryings from the Gulf Coast declined. This hardly suggests that the Atlantic Coast or any port thereon has suffered any

detriment or discrimination by reason of the application

of the Manila surcharge.

It will further be noted that the trend in newsprint carryings is closely paralleled by the trend of total carryings to the Philippines during the same period as set forth in paragraph 5 of Mr. Dennean's affidavit. It appears clear that the drastic decline in all carryings for the period January-May, 1965, must be attributable to the Janu-

ary and February longshoremen's strike.

Finally, we call attention to Exhibit A annexed to Mr. Dennean's affidavit, which sets forth the numbers of member lines which have served Searsport during the 1961-1965 period, the numbers of sailings which called at Searsport, the quantities of newsprint which were loaded at Searsport for the Philippines and for other Far Eastern destinations, and the total cargoes loaded at Searsport for the Philippines and for other Far Eastern destinations. From this table, it is apparent that the Far East exports through Searsport other than newsprint are negligible. It is further apparent that there are very substantial cargoes loaded at Searsport for destinations within the scope of the FEC other than the Philippines. Accordingly, the remedy of excising Searsport from the Conference Agreement on account of a [19] surcharge applicable at Manila only, of all of the Conference destination ports, would be analogous to a medical procedure of curing a headache by amputating the head.

The facts which we have been able to gather in the short time available do not suggest any prejudice or disadvantage to Searsport. It is noteworthy that throughout Docket No. 1155 and during the hearings before the Special Subcommittee on Merchant Marine of the Committee on Merchant Marine and Fisheries, House of Repre-

sentatives, "Review of Dual-Rate Legislation 1961-1964", 88th Cong. 2d Sess., Serial No. 88-24, where the subject of newsprint at Searsport was aired at pp. 418-21, 607-9, and in the present proceeding, there has been no complaint or protest from the port of Searsport. We have been advised, as these final paragraphs are being written, that some state port authority of the State of Maine has served on FEC a late-filed petition for leave to intervene. However, that petition, as read to us over the telephone, is not in the nature of a complaint, but rather, a routine intervention for the purpose of protecting interests as they may appear. Needless to state, if this port authority is granted leave to intervene, and files papers by way of affidavits and memoranda, the Order to Show Cause affords us no opportunity for rebuttal or cross examination.

CONCLUSION

This proceeding should be dismissed because: (a) it is procedurally defective under the APA and under §15 of the Ship- [20] ping Act; (b) under principles declared by the Supreme Court of the United States, it cannot possibly be held that FEC is discriminating against Searsport in favor of St. John; (c) it is not possible in this proceeding to develop the full factual record necessary for findings relating to discrimination between ports and between shippers, and what facts are available negate any such findings; and (d) the remedy proposed in the Order to Show Cause would create more discriminations

than it might eliminate and, pursued to its logical conclusion, would destroy the FEC.

New York, N.Y., August 20th, 1965.

Respectfully submitted,

ELKAN TURK, JR.
Elkan Turk, Jr.
Attorney for the Far East
Conference and its Member Lines,
Burlingham Underwood
Barron Wright & White
26 Broadway
New York, NY 10004

[Certificate of service, dated August 20, 1965, omitted]

[1]

[SAME TITLE]

State of New York, County of New York—ss.:

James A. Dennean being duly sworn deposes and says:

- 1. I am and since January 1, 1946, have been Chairman of the Far East Conference, 11 Broadway, New York, New York, 10004. Prior to January 1, 1946 I was the traffic executive of the New York agents for an important line in the Far East trade and have been conversant with the affairs of the Far East Conference since 1928.
- 2. Throughout the history of the Far East Conference under Agreement No. 17, which was approved in November, 1922, it has been an important and essential principle that the Conference agreement and tariff cover all loading ports on the Atlantic and Gulf coasts of the United States and that rates from all of those ports to each Far Eastern destination covered by the Conference agreement would be the same. By reason of this principle all loading ports covered by the Conference tariff would be in the same competitive position with respect to ocean freight rates to the Far East in their efforts to participate in this important branch of United States foreign commerce, also, by reason of this principle all member lines of the Conference enjoyed the same inducement to serve all ports within the scope of the Conference agreement and tariff.

[2]

- 3. If the principle mentioned in Paragraph 2 should be destroyed as suggested in the order to show cause by eliminating Searsport, or any other Atlantic or Gulf port from the Conference Agreement, one would ordinarily expect the lines to enter into open competition for cargo at that port with the result that rates applicable to that port would be depressed. In such event one would further expect cargo which normally would flow through neighboring ports to be diverted to the port affected by such competition. It can then be expected that the neighboring ports would complain of prejudice and disadvantage and if the theory of this order to show cause were repeated in each such instance the Conference would be destroyed. On the other hand, there are ports on the Atlantic and Gulf coasts which do not offer cargo to the Far East in sufficient volume and with sufficient regularity to attract regular calls by vessels of the member lines. In that event if the lines were freed from the obligations of the Conference tariff at such a port they might well increase the rates which they would charge in cases where they might make special calls to accommodate shippers at such ports. My information is that Searsport very likely is a port in the latter category. This tendency would be exaggerated during any period when cargoes in large volume were being offered at the principal loading ports.
- 4. In the regular course of Conference business, statistics are kept on an annual and monthly basis for the carryings of the member lines of each commodity in the

tariff from the Atlantic coast and Gulf coast to the countries of destination in the Far East. From those statistics I have excerpted the carryings of the member lines of newsprint paper to the Philippine Islands for the years 1961 to 1964 and for the months January through May of 1965 as follows:

[3]				
[0]	1961—Atlantic	9,192		
	Gulf	5,126		
			Total	14,318
	1000 10 15	2011		,,
	1962—Atlantic	6,044		
	—Gulf	1,855		
			Total	7,899
•	1963—Atlantic	6,933		
٠.	-Gulf	119		
			Total	7,052
	1964—Atlantic	7,105		
	-Gulf	62		
	<u> </u>			
			Total	7,167
Jan. t	hru			
	y 1965—Atlantic	1,033		
	—Gulf	-,,,,,		
	WAY.			
			Total	1.033

I attribute the notable decrease in carryings during the first five (5) months of 1965 to the longshoremen's strike which affected the entire Atlantic and Gulf coasts during January and February of this year. As

will appear in paragraph 5 below, the same tendency in carryings for the first five (5) months of this year is reflected in total carryings of the member lines.

5. From the statistics mentioned in paragraph 4 I have excerpted the total carryings of the member lines to the Philippine Islands both with bulk cargo excluded and with bulk cargo included for the same period covered in paragraph 4, as follows:

	Total Revenue Tons (Bulk Excluded)		Total Revenue Tons (Bulk Included)	
	1961	Atlantic	324,033	407,124
		Gulf	110,669	195,162
		Total	434,702	602,286
	1962	Atlantic	244,820	251,472
		Gulf	123,589	150,605
		Total	368,409	402,077
	1963	Atlantic	252,278	255,484
	2000		73,755	136,768
		Total	326,033	392,252
[4]	1964	Atlantic	278,029	287,090
		Gulf	106,721	147,227
		Total	384,750	434,317
Jan.	1965	Atlantic	79,127	88,792
thru May		Gulf	28,689	34,977
		Total	107,816	123,769

- 6. From the date set forth in paragraphs 4 and 5 it appears that the carryings of newsprint paper and of all items to the Philippine Islands were declining during the period 1961, 1962 and 1963 and then increased during 1964 the first full year during which the surcharge to Manila was applicable.
- 7. I have caused to be compiled a table of information received from member lines showing the number of lines which have called at Searsport during the period 1961 to date, the number of Conference sailings which have called at Searsport during the period, the number of tons of newsprint which have been loaded at Searsport during the period according to principal destinations in the Far East and the total cargo lifted at Searsport during the period for principal destinations in the Far East. That table is attached as Exhibit A to my affidavit.

JAMES A. DENNEAN

(Subscribed and sworn to August 20, 1965.)

EXHIBIT "A" TO AFFIDAVIT OF JAMES A. DENNEAN, SWORN TO AUGUST 20, 1965, IN RESPONSE TO ORDER TO SHOW CAUSE

COMPILATION OF CONFERENCE LINES SAILINGS AND CARGO LIFTED AT SEARSPORT, MAINE

	61					
	Total All Cargo Lifted	9,243	3,932	8,145	15,564	6,850
Other Cargo Lifted-Tons	Total	1	1	25	94	1
	All Other F.E.C. Areas	I	ı	1	1	i
	P. I.	1	1	25	94	I
Newsprint Lifted—Tons	Total	9,243	3,932	8,120	15,470	6,850
	All Other F.E.C. Areas	429				4,793
	F. I.	8,814	2,554	6,113	3,943	2,057
Number of	Lines Vessel Calling Sailings	17	11	16	19	80
Number of	Lines	4	4	4	2	ro
	fear	1961	1962	1963	1964	1965

Reply of Hearing Counsel to Memorandum of Respondent, Far East Conference, in Response to Order to Show Cause

[1]

[SAME TITLE]

In accordance with the Commission's Order to Show Cause served August 11, 1965, respondent Far East Conference (FEC) submitted its Memorandum (FEC Memo) with attached affidavit on August 23, 1965. Respondent contends that this proceeding is procedurally defective under the Administrative Procedure Act (APA); that the Commission cannot find that the FEC is discriminating against the Port of Searsport, Maine under applicable legal principles; that this proceeding does not allow sufficient facts to be developed relating to discrimination between ports and shippers; and that the remedy proposed by the Commission would create discriminations which would ultimately destroy the FEC (FEC Memo 19, 20).

The contentions of FEC, as demonstrated below, lack

merit.

I. RESPONDENT'S ACTIONS HAVE CAUSED THE CONTINUANCE OF UNJUST DISCRIMINATION AGAINST THE PORT OF SEARSPORT, MAINE

Respondent contends that it is not discriminating unjustly against Searsport. It maintains that the only facts which support such [2] a finding concern Maersk Line, not the conference and the former has ceased service to Searsport. The conference also argues that applicable legal doctrines require a finding that respondent is treating a competitive port more favorably than Searsport, since a

Reply of Hearing Counsel to Memorandum of Respondent, Far East Conference, in Response to Order to Show Cause

carrier or group of carriers cannot be held to have discriminated in rates unless it controls or effectively participates in the establishment of rates for service at both ports. Respondent states that it does not serve the Port of St. John, Canada, the allegedly preferred port, and has

no control over rates from that port.

Respondent's position is wanting because it attempts to conceal the legal implications of conference action by creating meaningless distinctions between Maersk and the FEC. Undeniably, Maersk is a conference member. Indeed, there is no such thing as a Maersk rate out of Searsport different from the FEC rate from that port. As a member of the conference, Maersk is required to adhere to the conference rate.1 However, respondent mistakenly assumes that one entity, the conference, maintains a surcharge at Searsport, and another entity, Maersk Line, assesses no surcharge at [3] St. John. They would have us believe that there is no connection between the two. In fact, Maersk has served Searsport and St. John. Furthermore, Maersk has been unable to remove its surcharge from the former port because the conference refused to grant permission. Therefore, Maersk, and any other conference member who desires to serve both ports, is compelled to maintain a discriminatory rate structure. Respondent cannot escape liability for violation of section 17 when it refuses to allow its members to terminate this prohibited situation. Had respondent granted permission to Maersk by proper tariff amendment, this proceeding

¹ This is one of the reasons why the court refused to order Maersk to remove the surcharge from Searsport when the Commission sought to enforce its order in Docket 1155 which directed such removal. As the court found, section 18(b)(3) requires Maersk to abide by the conference tariff. See Federal Maritime Commission Against Macrsk Line, U.S. District Court, S.D. N.Y., Misc. 18-304, July 28, 1965, p. 6.

Reply of Hearing Counsel to Memorandum of Respondent, Far East Conference, in Response to Order to Show Cause

would never have commenced. As the Commission so recently stated:

"Conferences, which exist pursuant to approval must not only cooperate fully to eliminate discrimination but, indeed, we expect them to take the lead to such end." Imposition of Surcharge of Cargo to Manila, Republic of the Philippines, F.M.C. Docket No. 1155, Order Denying Request for Extension of Time, February 19, 1965.

FEC is hardly taking the lead expected. Indeed, instead of eliminating discrimination, it is fostering and perpetuating it.

It is no answer that the discrimination was terminated because Maersk has ceased to serve Searsport. The record in Docket 1155, as well as the attached affidavit confirms that Maersk had called at that port.² [4] More significant is the fact that should any conference member call at Searsport, it must assess the surcharge since the conference refuses to amend its tariff. Furthermore, the failure to serve the port in order to avoid compliance with the Commission's order in Docket No. 1155 to remove the objectionable surcharge aggravates the situation by denying service to that American port. Respondent's contention that Maersk has successfully complied with the Commission's order by abandoning service to Searsport is not compliance but rather a new form of discrimination against that port.³

² Imposition of Surcharge on Cargo to Manila, Republic of the Philippines, F.M.C. Docket No. 1155, February 3, 1965, p. 9. See also transcript of hearing in that case, pp. 933, 950-951, and Exhibit 116. In 1963, Maersk called at Searsport four times. Affidavit, p. 2.

³ Apparently Maersk has not called at Searsport since October 1963. Affidavit p. 2.

Reply of Hearing Counsel to Memorandum of Respondent, Far East Conference, in Response to Order to Show Cause

Briefly, then, it is respondent whose refusal to amend its tariff, compels the continuance of a situation which has been found to be a violation of section 17. Although the actual instrumentality of discrimination is Maersk which serves both Searsport and St. John, the underlying responsibility for the continuation of the discrimination rests with the conference. The title of this case and reference to the "FEC surcharge", contrary to respondent's assertions, are correct. The only proper order against the surcharge which could be effective, must be directed against the conference.

[5]

An order of the Commission directed against a conference for application on all its members is proper although not all members are engaged in the prohibited activity. In Nickey Brothers, Inc. et al. v. Manila Conference, 5 F.M.B. 467, 478, 479 (1958), the Commission issued such an order and stated:

"As noted above, certain respondents, although members of the conference either are not engaged in this trade or are not qualified to participate in the establishment of rates by the group engaged in this trade. These respondents, enumerated in footnote 1... are found not to have violated sections 16 First and 17 of the Act. They are members of the conference, however, and in ordering the conference to establish parity rates for logs and lumber . . . our order is directed to all members of the conference." 5 F.M.B. at pages 478, 479.

⁴ The court apparently concurs. It suggested that the Commission take action against the conference, rather than Maersk Line, in order to effectuate its order. See F.M.C. v. Maersk, cited above, pp. 5-6. In fact, it stated this to be an "appropriate procedure." p. 6.

Reply of Hearing Counsel to Memorandum of Respondent, Far East Conference, in Response to Order to Show Cause

II. THE COMMISSION IS AUTHORIZED TO DISAPPROVE THE CON-FERENCE AGREEMENT ON THE BASIS OF FACTS WHICH CONFIRM FINDINGS MADE IN DOCKET No. 1155

Respondent contends that this proceeding is misconceived in view of section 15 which makes approval of an agreement mandatory unless it is found to operate in one of four ways proscribed therein. (FEC Memo 6). To rephrase respondent's arguments, the Commission should have initiated a proceeding wherein the Commission or some party other than respondent would have to make a showing of violations of section 15 and not thrust upon it the burden of showing why the conference argeement continues to merit approval. (FEC Memo 6).

[6]

Issues relating to burdens of proof have been considered by the Commission which has stated that determination of section 15 issues can be made on the basis of an adequately developed record regardless of burdens of proof. Alcoa S.S. Co., Inc. v. CAVN, 7 F.M.C. 345, 358 (1962). In the instant proceeding, all that must be determined is whether there is a sufficient factual basis to support a finding of unjust discrimination by respondent. If so, respondent's agreement is operating in violation of section 15 and disapproval or modification is mandatory.⁵

⁵ Section 15 provides in pertinent part:

[&]quot;The Commission shall by order, after notice and hearing, disapprove, cancel, or modify any agreement or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their

A finding of unjust discrimination against the Port of Searsport, Maine, and the Great Northern Paper Company, an American shipper of newsprint, was made in Imposition of Surcharge on Cargo to Manila, Republic of the Philippines, F.M.C. Docket No. 1155, February 3, 1965, pp. 8, 9. This proceeding is an outgrowth of Docket 1155 since respondent FEC has prevented Maersk Line from complying with the order issued in that case. [7] The finding of unjust discrimination was based upon substantial evidence adduced in an evidentiary hearing. Such evidence demonstrated that the Great Northern Paper Company, an American exporter of newsprint, was suffering from competition with Canadian manufacturers who shipped via St. John, a port on which no surcharge was levied. The record showed that newsprint is a low-rated commodity with a small margin of profit and that during the first two months in which the surcharge was applied, Great Northern shipped no newsprint to the Philippines. However, shipments did resume although Great Northern was forced to absorb the surcharge in order to remain The Commission also found that Great competitive. Northern had suffered pecuniary harm and had diverted traffic to St. John which would have moved via Searsport but for the surcharge. Both Great Northern and the Port of Searsport, therefore, were placed in a disadvantageous position with respect to the competitive manufacturer and port in Canada. In view of the preceding facts, the Commission found the surcharge on Searsport to be unjustly discriminatory and violative of section 17.

foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations."

We discuss issues pertaining to notice and hearing later.

Evidence in the instant case confirms the Commission's findings in Docket 1155. Great Northern and the Port of Searsport are still suffering competitively because of the continued existence of the surcharge. Great Northern's business to the Philippines continues to decline while its Canadian competitors improve their position. (Affidavit 1-4). Average tonnages shipped by Great Northern per month declined in 1963, 1964, and 1965 with volumes of 560, 306, and 254 respectively. [8] (Affidavit 1). Since the imposition of the surcharge, moreover, Great Northern has been forced to absorb approximately \$30,000 (Affidavit 5). Its Canadian competitors have been free of such a burden (Affidavit 5). Newsprint is a commodity with a low margin of profit, as the Commission found earlier. The existence of the surcharge has an adverse effect on this profit and tends to discourage sales to the Philippines, even though the company does not pass the surcharge onto its Philippine customers (Affidavit 5).

Despite certain advantages which exist at Searsport with respect to efficient handling and lower cost of rail transportation from Great Northern's mill, the company has nevertheless diverted traffic to St. John, Canada because of the surcharge at the American port (Affidavit 5). The lower ocean rate out of St. John and the absence of a surcharge at that port create a situation wherein the Canadian port becomes preferable to Searsport for Great Northern. This situation is aggravated by the fact that effective November 1, 1965, the conference surcharge will be increased to \$10 per ton. The evidence in this case thus corroborates that adduced in Docket No. 1155 and confirms the wisdom of the Commission's earlier findings of discrimination against Great Northern and

⁶ See F.E.C. Tariff No. 23, Correction No. 4937, 10th Revised page A, issued July 30, 1965.

Searsport. Respondent [9] does not deny the facts developed in the earlier case but contends that those facts apply only to Maersk.7 But the findings in the earlier case must stand. No party has undertaken to challenge them by means of appellate review.8 The earlier findings are furthermore confirmed by evidence in the present case, and the finding of discrimination is buttressed by subsequent events which are not in dispute. For instance, Maersk Line has not called at Searsport since the date of the Commission's order in Docket 1155. Nevertheless that line attempted to free itself of its obligation to assess a surcharge at Searsport, but the conference has thrice refused to eliminate the surcharge from its tariff as urged by Maersk. The condition which compels Maersk or any other conference line serving both Searsport and St. John to maintain a discriminatory surcharge continues and the responsibility for this condition lies with [10] respondent. Under such circumstances, the Commission has a sufficient evidentiary foundation to find a violation of section 15 and to modify the conference agreement insofar as it applies to Searsport.

⁷ FEC also contends that it is necessary to develop "numerous and complex" facts in this proceeding to show unjust discrimination by the conference. (FEC Memo 10).

⁸ Moreover, the Commission's determination of unjust discrimination should be binding in accordance with the doctrine of resjudicata especially here where the second proceeding involves the same transaction, same parties, and same issues. See Davis, Administrative Law Treatise, Chapter 18.

- III. MISCELLANEOUS CONTENTIONS OF RESPONDENT ARE
 - A. The Vindictive and Harassing Nature of This Proceeding

Respondent contends that this proceeding was "conceived in vindictiveness and dedicated to harassment" (FEC Memo 3), because the Commission was unable to enforce its order against Maersk in the courts and because respondent is allowed no opportunity to file responsive pleadings before oral argument. These accusations are plainly unjustified. Since the origin of this proceeding lies in the refusal of respondent to allow compliance with an order of the Commission directed against discrimination, we submit that respondent alone has made this proceeding inevitable. It can hardly expect that its obstruction will be ignored and that the Commission will abdicate its regulatory responsibilities.

B. The Need for Cross-Examination

Respondent contends that this proceeding is defective because it denies the opportunity for cross-examination which is guaranteed by the Administrative Procedure Act. It is further contended that the facts necessary to show unjust discrimination are numerous and complex, that [11] they cannot be developed on the basis of affidavits and that section 15 forbids final Commission action without "notice and hearing" (FEC Memo 3, 4, 6, 7, 9, 10, 14). These contentions too are infirm. The APA does not require a full evidentiary hearing with opportunity for cross-examination in every instance. The language cited by respondent shows this as section 7(c) merely states:

"... Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." (Emphasis added).

The obvious qualification is that a party is entitled to cross-examination only where it is necessary for full disclosure of the facts. Furthermore, the "hearing" to which respondent is entitled does not necessarily mean a full evidentiary proceeding. "Hearing" is defined to be "any oral proceeding before a tribunal". Davis, Administrative Law Treatise, Section 7.01, p. 407. It may be by trial or argument. Davis, op. cit. p. 407.

Respondent is, of course, entitled to a fair hearing. But that concept means only that the party must have an opportunity to meet [12] such facts which adversely affect its interests in an appropriate manner. A leading authority on administrative law has discussed this problem at some length and concluded:

"The cardinal principle of fair hearing is neither that all facts used should be in the record unless they are indisputable, nor that all facts used should be subject to cross-examination and rebuttal evidence, nor that 'nothing can be treated as evidence which is not introduced as such', but it is that parties should have opportunity to meet in the appropriate fashion all facts that influence the disposition of the case." Davis, Administrative Law Treatise, Vol. 2 Section 15.14, p. 432.

This is confirmed by the legislative history to section 7(c) which shows that cross-examination is considered to be necessary only to the extent required to bring out the truth. See report of Senate Committee, Sen. Doc. No. 248, 79th Cong., 2d Sess. 209 (1946).

It is well recognized in administrative law that cross-examination is unnecessary where no issue of fact is raised and the party has full opportunity to be heard on the issue of law. American Air Transport and Flight School, Inc. Enforcement Proceeding, 15 C.A.B. 218 (1952), 2 Pike and Fischer Ad. Law 2d 213.

Respondent suggests that this doctrine does not apply here because there are "numerous and complex" facts which would be in dispute (FEC Memo 10). However, we submit that this proceeding has provided ample opportunity to respondent in which to meet all facts which affect it adversely. Respondent knew that the Commission had made findings of unjust discrimination in Docket 1155; that the Commission had ordered a member line to cease and desist from assessing the discriminatory surcharge and to notify the Commission as to how the discrimination would [13] be eliminated. Nevertheless, respondent refused to eliminate the Searsport surcharge from the conference tariff so as to allow its member line to comply with the Commission's order.

These facts are not numerous and complex. They speak for themselves and there is no need for respondent to cross-examine itself as to why it chooses to hinder the Commission's order in Docket 1155. This proceeding has provided respondent with an ample opportunity to justify its actions. However, instead of providing justification, respondent replies that this proceeding is procedurally defective, that it wants to cross-examine and develop more facts, that the Commission's order would lead to further discrimination, and that discrimination was practised by a member line, not by the conference. We submit that respondent has been given full opportunity to justify its actions and has failed to do so. The requirements of the APA have indeed been met.

Even if respondent were entitled to cross-examination, in large measure it has already been accorded that privilege. The evidence on which the Commission made its findings of unjust discrimination in Docket No. 1155 was subjected to thorough cross-examination by respondent at the evidentiary hearing held in that case. If respondent wished to challenge the Commission's findings therein, the proper means to do so would have been appellate review. The evidence in this case merely updates and confirms the record developed earlier, which was not challenged by respondent or anyone else.

[14]

C. Lack of Notice as Required by Section 5(a) of the APA

Respondent also claims that the Order to Show Cause is devoid of notice of any relevant facts as required by section 5(a) of the APA. That section requires that persons entitled to notice of an agency hearing, "shall be timely informed of . . . (3) the matters of fact and law asserted" (FEC Memo 6, 7). This contention has no more validity than the preceding one relating to cross-examination.

The requirements of notice and specificity in administrative law are flexible. Unlike the stricter rules of common law, pleadings before administrative agencies are not required to be framed with detailed particularity. As one authority states:

"The most important characteristic of pleadings in the administrative process is their unimportance. And experience shows that unimportance of plead-

ings is a virtue. In the judicial system the long-term movement has been from the common-law system of pleading to formulate issues, to the early code ideal of stating all material facts, to the view now prevailing in the federal courts that fair notice is the objective . . . Of pleading in the courts, Professor Moore says in his treatise: "The modern philosophy concerning pleadings is that they do little more than indicate generally the type of litigation that is involved . . . A generalized summary of the case that affords fair notice is all that can be expected.' . . . Davis, Administrative Law Treatise, Section 8.04, p. 523.

Administrative processes are more flexible than those of the courts, where the modern philosophy only requires "a generalized summary of the case that affords fair notice." As Professor Davis states else- [15] where in his work, "The key to pleading in the administrative process is nothing more than opportunity to prepare." Davis, op. cit., section 8.04, p. 525. The courts support these statements of the law. In Cella v. United States, 208 F. 2d 783 (7th Cir. 1953), the court held that in an administrative proceeding, it is only necessary that the one proceeded against be reasonably apprised of the issues in controversy, and any such notice is adequate in the absence of a showing that a party was misled. As this Commission itself has stated in a previous case, all that is required in a pleading instituting an agency action is a statement of the things claimed to constitute the offense charged in order that respondent may put on his defense. Pacific Coast European Conference-Limitation on Membership-Report on Demand for Bill of Particulars, 5 F.M.B. 39, 42 (1956).

Clearly under any of these standards, respondent has received adequate notice. The Commission's order which initiated this proceeding contains a summary of the case which sets forth the chronological series of events including the Commission's finding of discrimination in Docket No. 1155, respondent's refusal to alow Maersk to comply with the Commission's order in that case and the court's determination that such order would not be enforced if it were directed merely against a single member of the con-The Commission's order also states that the applicable tariffs of the conference result in a situation which is in [16] violation of the Shipping Act. Respondents are thus aware of every essential fact which gave rise to this controversy. Indeed, as we have shown above, their own recalcitrance is the chief cause for this proceeding.

D. Absence of Conference Control Over Rates From St. John

Respondent submits that it has no control over activities of any line which serves Canadian ports since such service is beyond the scope of the conference agreement (FEC Memo 10). Without such control, argues respondent, it canont be held accountable for discrimination between American and Canadian ports and the Commission is without authority to alter the situation by an order directed against FEC. Respondent misconceives the Commission's objective. The Commission is not attempting to impose its authority on Canada or lines serving Canada. It is merely seeking to remove discrimination from a port in the United States where its jurisdiction is unquestioned. We have already shown that the conference exercises

control over member lines which serve both Searsport and St. John by virtue of the fact that such lines must adhere to the conference tariff when they serve the former. It is by means of this control that the conference continues to maintain a discriminatory situation which is the subject of this proceeding.

E. Increase in Volume of Newsprint Exported From the Atlantic and Gulf Ports in 1964 and Thereafter Shows No Harm Caused by the Surcharge

Respondent submits that its surcharge has caused no harm or detriment "to the Atlantic Coast or any port thereon" since conference [17] statistics show that the volume of newsprint actually exported to the Philippines from the Atlantic and Gulf ports increased slightly in 1964 despite the surcharge. 10 This position is meritless. This proceeding involves the effect of the surcharge on the Port of Searsport, Maine, only, specifically with respect to diversion of traffic to Canadian ports. Aggregate statistics relating to the entire Atlantic and Gulf Coast range have no probative value as far as Searsport is concerned. Much more meaningful are the conference's own statistics for Searsport, the significance of which respondent not surprisingly ignores. These statistics show a decline of 6,113 tons for 1963 to 3,943 in 1964. Respondent's own figures tend to corroborate the findings of diversion from Searsport made by the Commission in Docket No. 1155.

¹⁰ In 1963, 7,052 tons were exported to the Philippines from Atlantic and Gulf ports. In 1964, the volume was 7,167 (Affidavit of J. Dennean, p. 3).

F. The Elimination of Searsport From the Conference Tariff Would Result in the Assessment of Higher Rates From That Port and Possibly the Destruction of the Conference

Respondent contends that if it is compelled to eliminate Searsport from its tariff, the probable result would be that rates from that port would be increased. This argument rests on the assumption that Searsport, an outport offering only a small volume of cargo, would not ordinarily attract carriers without the inducement of higher rates since supposedly carriers readily fill their vessels at the principal ports. [18] Furthermore, the elimination of the surcharge at one port would upset "competitive parity" among the ports which would lead to complaints from adjoining ports, and ultimately the destruction of the conference. These contentions likewise lack foundation.

Firstly, it is not established that vessels can readily be filled at principal ports in the vicinity of Searsport so that that port would be rendered unattractive. Vessels proceeding from St. John to other ports in the Atlantic range would pass Searsport en route. If vessels are not full, moreover, cargo waiting at Searsport would be inducement enough. Again, respondent ignores its own statistics. As respondent states: "It is further apparent that there are very substantial cargoes loaded at Searsport for destinations within the scope of the FEC other than the Philippines" (FEC Memo 18). If so, there is hardly a need for artificial inducement by means of higher rates which respondent prophesies.

The argument that "competive parity" among the ports would be upset, and that subsequent complaints from ports would ultimately destroy the conference, rests on an

equally feeble foundation. There is no showing by respondent that the situation at Searsport, namely, competion with St. John, exists elsewhere, or that the other ports in the Atlantic range are competitive with Searsport. Respondent has made no showing that traffic would be diverted from Philadelphia, New York, [19] Boston, or even Portland, Maine, to Searsport merely because a surcharge were lifted from the latter port.11 There is furthermore no evidence that adequate facilities at Searsport exist so that any diversion of traffic could occur. As respondent informs us, "it is apparent that the Far East exports through Searsport other than newsprint are negligible" (FEC Memo 18). The small volume of cargo lifted at that port by the conference would indicate Searsport to be a relatively minor port with limited facilities. In short, the "competitive parity" which respondent invokes, is pure speculation.12

¹¹ Moreover, the surcharge would be lifted only on the Manila trade and almost entirely from one commodity, newsprint.

¹² Such speculation, furthermore, has been held to be extraneous where similar issues have been litigated before the Interstate Commerce Commission. In this connection, the I.C.C. stated:

[&]quot;Cases of alleged undue preference or prejudice must be adjudged upon their respective merits, and seldom, if ever, may such cases be controlled by results of other controversies supposed to be of like nature. But however much weight may be attached to the stated considerations we could not under the law deny the relief asked in this proceeding on the ground that other points similarly situated, if such there be, might thereby be induced to ask for like relief." Chamber of Commerce of Newport News v. Southern Ry. Co., 23 I.C.C. 345, 356 (1912).

IV. Conclusions

Respondent has caused the continuance of unjust discrimination against the Port of Searsport, Maine, by its own actions, namely, the refusal to amend its tariff to allow any member line to call at that port without assessing a surcharge thereby creating a preference in favor [20] of the Port of St. John, Canada and a discrimination against Searsport, Maine. Although respondent does not control rates from Canadian ports, it controls the rates from Searsport of any member calling at both the American and Canadian ports. The underlying responsibility for discrimination against Searsport lies with the conference although the actual instrumentality by which such discrimination is implemented is a member line serving St. John, Canada, as well as Searsport. Any effective order of the Commission designed to eliminate discrimination against Searsport must be directed therefore against the conference.

The Commission's findings in Docket No. 1155, together with corroborating evidence in this case and certain indisputable events subsequently constitute a sufficient basis for findings of violation of section 15 and modification of the conference agreement as it applies to Searsport. Had respondent, furthermore, cooperated with Maersk Line and the Commission by allowing that line to comply with the Commission's order in Docket No. 1155, there would have been no need for this proceeding.

This proceeding seeks to remove discrimination from an American port which is not beyond the scope of the Commission's jurisdiction. Cross-examination is not an absolute prerequisite in administrative proceedings, especially where, as here, respondent enjoyed it in an earlier

related proceeding and additional facts are clear and indisputable. Similarly, respondent has been reasonably apprised of the issues in this [21] controversy and has had a fair opportunity to justify its refusal to amend its tariff. Rather than justify its surcharge, however, respondent relies on contentions of procedural unfairness and speculates about catastrophies which would threaten its existence.

V. ULTIMATE CONCLUSION

The record will not support a finding that respondent's basic agreement should be disapproved in its entirety or that the Port of Searsport be removed entirely from the scope of the conference agreement. However, there is ample support for the Commission to modify the agreement by removing conference authority to fix rates from Searsport to Manila or in the alternative to remove such authority on newsprint shipped via that port. Either modification would serve to eliminate the discrimination against Searsport.

Respectfully submitted,

ROBERT J. BLACKWELL
Director
Bureau of Hearing Counsel

NORMAN D. KLINE Hearing Counsel

Washington, D.C. September 8, 1965

[1]

[SAME TITLE]

I, Joseph Carena, manager of the international division of Great Northern Paper Company, depose and say that the following facts are true and correct to the best of my knowledge and belief.

Exportation of Great Northern newsprint to the Philippines has been undergoing a steady decline at least since 1962. On the other hand, the volume of newsprint exported by Canadian competitors to the same market continues to increase.

In 1963, Great Northern exported 6,731 short tons; in 1964, 4,272; and in the first eight months of 1965, 2,029. The average tonnage per month for these three years is 560; 306 (excluding one shipment from St. John); and 254 respectively. A detailed analysis is presented in the following table:

STATEMENT OF TONNAGE SHIPPED TO THE PHILIPPINES FROM THE PORTS OF SEARSPORT AND ST. JOHN

1963

	January	None due to strike		
	February	SS "Phil. Pres. Quirino"	February 4	623 short tons
	[2]			
,		SS "Tagaytay"	February 9	550 short tons
		SS "Pres. Jefferson"	February 14	422 short tons

March	SS "Anna Maersk"	March 9	589 short tons
	SS "Phil. Pres. Roxas"	March 18	269 short tons
April	SS "Turandot"	April 9	549 short tons
May	SS "Pres. Harrison"	May 8	237 short tons
	SS "Leda Maersk"	May 11	279 short tons
June	SS "Phil. Pres. [Illegible]"	June 14	661 short tons
July	SS "Traviata"	July 16	328 short tons
August	SS "Luna Maersk"	August 26	544 short tons
	SS "Pres. McKinley"	August 23	250 short tons
September	SS "Pres. Harrison"	September 7	15 short tons
	SS "Phil. Pres. Quirino"	September 24	449 short tons
October	SS "Toreador"	October 7	577 short tons
	SS "Jeppesen Maersk"	October 27	389 short tons
November	None		
December	None		
	T	otal Tonnage	6,731 short tons
1963	Monthly Average		561 tons

[3]

STATEMENT OF TONNAGE SHIPPED TO THE PHILIPPINES FROM THE PORTS OF SEARSPORT AND ST. JOHN

1964

January	SS "Turandot"	January 7	690 short tons
	SS "Mazal" (St. John)	January 25	600 short tons

February	SS "Phil. J. A. Santos"	February 10	550 short tons
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March	SS "Tagaytay"	March 18	415 short tons
	SS "Phil. Pres. Roxas"	March 27	$380 \mathrm{\ short\ tons}$
May	SS "Pioneer Moon"	May 7	692 short tons
July	SS "Magsaysay"	July 1	210 short tons
September	SS "Phil. Pres. Quirino"	September 16	348 short tons
October	SS "Pres. Harrison"	October 10	104 short tons
	SS "American Charger"	October 22	60 short tons
December	SS "Phil. Pres. Roxas"	December 10	223 short tons
	То	tal Tonnage	4,272 short tons
1964	Monthly Average	Excluding St.	John 306 tons

STATEMENT OF TONNAGE SHIPPED TO THE PHILIPPINES FROM THE PORTS OF SEARSPORT AND ST. JOHN

1965

January	SS "Pioneer Main"	January 9	74 short tons
March	SS "Tarantel"	March 4	436 short tons
[4]			
April	SS "Toreador"	April 6	500 short tons
May	SS "Philippines"	May 3	388 short tons
June	SS "Traviata"	June 3	318 short tons
August	SS "Don Antonio"	August 4	313 short tons
			2,029 short tons
1965	Monthly Average to date		254 tons

The increase in sales of newsprint to the Philippines by Canadian manufacturers is shown by the following table:

EXPORTS OF NEWSPRINT FROM CANADA (short tons)

1963	25,790
1964	27,367
1965 (1st 4 mos.)	7569
1964 (1st 4 mos.)	4659

Source: The Newsprint Service Bureau Bulletin No. 567, April 1965 Bulletin No. 570, July 1965

In order to protect its position in the face of stiff Canadian competition in the Philippine market, Great Northern has been compelled to absorb the surcharge imposed by the Far East Conference. During the first two months in which the surcharge was in effect, i.e. November and December, 1963, Great Northern shipped nothing to the Philippines. However, with the absorption of the surcharge by Great Northern, its shipments resumed, although steadily declining as we have seen.

[5]

Since November, 1963, Great Northern has shipped 6301 short tons of newsprint subject to the surcharge and has absorbed for its account approximately \$30,000 in surcharges. Its Canadian competitor, however, has not been faced with this added expense. The existence of the surcharge has an adverse effect on Great Northern's profit margin and tends to discourage sales to the Philippines, even though the company does not pass the surcharge onto its Philippine customers.

St. John, Canada, and Searsport, Maine are competitive ports. There are advantages to the Maine port with respect to efficient handling and lower cost of transportation by rail from Great Northern's mill in Millinocket. However, one shipment of 600 tons was made via St. John instead of Searsport owing to the presence of a surcharge at the American port on January 25, 1964. The lower ocean rate out of St. John and the absence of a surcharge offset the greater rail cost to the Canadian port.

Under the present structure of rail and ocean freight rates involving Searsport and St. John, the proposed \$10 per ton surcharge, effective November 1, 1965, will make St. John the preferable port. Great Northern would, under such circumstances, divert its shipments from Sears-

port, to the Canadian port.

Joseph Carena Joseph Carena

(Verification omitted)

Excerpts from Transcript of Oral Argument Before the Federal Maritime Commission, September 16, 1965

(A)

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[1]

FEDERAL MARITIME COMMISSION

Docket No. 65-29

[SAME TITLE]

Room 114, Centennial Building 1321 H Street, Northwest Washington, D.C. 20025 Thursday, September 16, 1965

The Commission met, pursuant to notice, at 9:30 o'clock a.m., to hear oral argument in the above-entitled matter, the Honorable John S. Patterson, Vice Chairman, presiding.

Present:

JOHN S. PATTERSON, Vice Chairman ASHTON C. BARRETT, Commissioner JAMES V. DAY, Commissioner GEORGE H. HEARN, Commissioner

APPEARANCES:

ELKAN TURK, Jr., Esq., of Burlingham, Underwood, Barron, Wright & White, 26 Broadway, New York, New York, 10004, on behalf of respondent Far East Conference, 11 Broadway, New York, New York, 10004.

Appearances

Edward Langlois, General Manager, Maine Port Authority, Portland, Maine, on behalf of Maine Port Authority.

NORMAN D. KLINE, Esq., Hearing Counsel, on behalf of Federal Maritime Commission.

[2]

PROCEEDINGS

The Chairman: Good morning, gentlemen.

The Federal Maritime Commission has scheduled at this time oral argument in Docket No. 65-29—Imposition of Surcharge by the Far East Conference at Searsport, Maine.

Who appears for the Far East Conference?

Mr. Turk: Elkan Turk, Jr., of Burlingham, Underwood, Barron, Wright & White, 26 Broadway, New York City.

The Chairman: Who appears for the Maine Port Authority?

Mr. Langlois: A. Edward Langlois, Jr., General Manager.

The Chairman: Who appears for Hearing Counsel?

Mr. Kline: Norman D. Kline.

The Chairman: Mr. Turk, you will be allowed forty minutes. Mr. Langlois will be allowed ten minutes. Mr. Kline will be allowed thirty minutes.

Mr. Turk, you may proceed if you would please.

Mr. Turk: Mr. Vice Chairman and Members of the Commission, if I may I would like to reserve twenty minutes of my time for rebuttal argument.

[9] * * *

On extremely short notice the Conference has been called on to show cause, not at a hearing, but on affidavit and lawyers' talk and a memorandum, while the Agreement should not be ordered modified. The order says amended—Section 15 says modified.

This is entirely turning upside down the thrust of Section 15 as it appears on its face, ignoring Section 23 as the clear language of that Section demonstrates and it is utterly disregarding the language of the United States Court of Appeals for the District of Columbia circuit.

The Chairman: In what respect is it contrary to Section 23?

Mr. Turk: Because a full hearing, Mr. Patterson, does not contemplate just the filing of a few affidavits and an oral argument such as we are having this morning. It contemplates—if there is an issue of fact—and I am going to be candid with you—if you had an Agreement let us say which by its very language violated some requirement of Section 15 so that all you had to do was to look at the language and perhaps argue about its interpretation, but nothing else.

I do not say you have to have an examiner designated to take a lot of evidence before you got to the end of the road, but this is not that kind of a case. You can look at [10] the Far East Conference Agreement from now to next Christmas and not find anything in the language of the Agreement which is of itself unjustly discriminatory in Searsport, or in any other place.

There are a lot of complex, factual issues which are involved in the determination of Port discrimination or personal discrimination and cargo discrimination and this is not an appropriate way to dispose of issues like that, especially when less than a year ago—as a matter of fact

only about six months ago—the Commission held that this Far East Conference surcharge did not unjustly discriminate and was not in violation of Section 15, or of any other section of the Act.

Section 23 of the Shipping Act passed in 1916 really anticipated what was later enacted in the Administrative Procedure Act because other agencies did not have similar directions in their basic statutes or if they had them they were not paying too much attention to them.

The Administrative Procedure Act in Section 5(a) spells out that in a proceeding of this sort the respondent is entitled to fair notice of the matters of fact and law to

be asserted against him.

I think it is clear when you take the order to show cause here and lay it against the arguments that Hearing Counsel have made in support of it that we did not get notice [11] at all of what the true contention in support of this order was.

Section 7 of the Administrative Procedure Act in sub-

division (c) spells out that-

"Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof."

Well, obviously the Far East Conference is not proposing any order here and still this order to show cause procedure does atempt to thrust upon us some burden of proof that we are not violating the Act and that our Agreement should not be required to be amended, which is exactly the reverse of what the Administrative Procedure Act said should be done.

Section 7(c) also says-

"Every party shall have the right to present his

case or defense by oral argument or documentary evidence, to submit rebuttal evidence,"—

-which this order does not allow us to do.

-"and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

Now in their documents Hearing Counsel sort of look down their nose at the proposition that we ought to be able to do a little cross-examining.

If time permits on my direct examination, I want to [12] get to that affidavit of Joseph Carena which was annexed to Hearing Counsel's papers in this case and point out a few topics on which I would very much like to sit Mr. Carena in that witness chair and ask him a few pertinent questions which I think might enlighten the Commission as to whether there is any true unjust discrimination here.

We start now with the proposition that you have ruled against me, let's asume, and you say the order to show cause is okay, the burden is on you, go ahead. What is wrong with what we are doing here?

Well, the first thing that is wrong with it is that you cannot possibly make an order based on a finding that the Far East Conference is prejudicing Searsport as compared with St. John in Canada. Why can't you do it? Well, we were over this ground only a couple of weeks ago in Docket No. 1114 in the Iron and Steel case where one of the questions assigned specifically for argument was whether you can find a violation of Section 17 where the same carrier is not the rate maker of both rates which you are comparing.

In other words, when you have a question of discrimination or prejudice it is because two different people, or places, or kinds of traffic are being charged different rates

and the question is—Is there any justification for that differential?

But, before you can get to any questions you have [13] to have one rate making authority which is responsible for the establishment of two different rates. Otherwise you do not have any one rate making authority which is discriminating, or preferring, or prejudicing. That is so fundamental and simple that one would not think it needs too much argument.

[18] * * *

That is just a smokescreen. We could not seek review of the order in Docket 1155. Now, all of those complicated issues we are entitled to litigate. We are entitled to see the witnesses that are brought in to testify against us and to ask pertinent questions and test their knowledge, their candor, and everything else that bears upon believing their story and the sufficiency of their story as a basis for an adequately supported finding that our surcharge at Manila when applied at Searsport is unjustly discriminatory against Great Northern Paper Company, or anybody else.

That opportunity we are not having here. We would like to have it if you get to that point but I submit to you that you cannot get to that point because no amount of evidence at all would enable you to make a proper holding that the Far East Conference has discriminated unjustly here.

[19] * * *

1963 in turn represented an increase over 1962. However, 1962 represented a very substantial drop from 1961. Now, there was no surcharge imposed at the end of 1961. Apparently there are, as we all know there are, factors

affecting the movement of these goods across ten thousand miles of ocean that are very numerous, that work their way out in very complicated and sometimes unfathomable ways and the indication here is that there have been factors at work making for an erratic annual movement of newsprint from the Atlantic ports of the United States to the Philippines which have nothing to do with the surcharge and probably nothing to do with the ocean rate.

I think we ought to be entitled to examine very carefully the marketing problems of newsprint in the Philippines before we jump to any conclusions that this surcharge has had anything at all to do with the change in the marketing of newsprint there and, indeed, in 1964 we did carry more newsprint than we did in 1963.

Of course, January through May carryings were substantially affected by the Longshore strike and later the strike of American flag seamen, so that your picture through May of 1965 is distorted. That also should be developed on the basis of evidence and not just arguments from [20] fragmentary statistics.

I submit to you that there is nothing here that is in the slightest suggestive that there has been any suffering by Searsport or Great Northern, or its fall guy Van Reekum Paper Company, as the result of this surcharge.

[21] * * *

I think it is important to bear in mind that, leaving out of the question the validity of the finding of discrimination in Docket 1155, the finding was made and a proper order in a discrimination case was entered. I think we have to keep that in mind.

What the Commission told Maersk and Pacific Star was that respondents, Maersk Line and Pacific Star Line, cease

and desist from assessing on newsprint moving from Searsport, Maine to Manila, Republic of the Philippines a surcharge which is prejudicial and discriminatory to exporters of newsprint in the United States and to the Port of Searsport, Maine.

Now, I think the author of that was correct and very clear. He did not say to Maersk and Pacific Star that you must knock off your surcharge at Searsport. He did not say to Maersk and Pacific Star that you must put on a surcharge at St. John. He didn't say to them that you must decrease your Searsport surcharge and put on a countervailing surcharge at St. John.

He said that you have to stop charging a surcharge which is unjustly discriminatory. He did what the Supreme Court in the Texas and Pacific case said he must do. He must give these carriers found to have created a discrimination [22] alternatives as to how they would correct the discrimination which was found to exist. What courses were open to Maersk Line as a result of the order?

It could, if it chose, put a surcharge on up at St. John even though on the evidence that would have meant that it would lose cargo to Pacific Star Line, its competitor up there.

It could have resigned from the Far East Conference. I don't suggest that seriously. I hope they will never think of doing it. But that was a possibility.

There seems to be in the background here some notion that Maersk is tied by a ball and chain to the Far East Conference and unless we let them knock off a surcharge at Searsport they cannot possibly do it.

That is not so. Legally and technically they may under the Conference Agreement give notice of resignation and be free of any obligation to observe the Conference tariff.

What else might they do? They never really have held

themselves out to have a common carrier service at Searsport. If we got to a case involving this I would like to get evidence as to their holding out to the public as to their itinerary on this Far East service but I am quite sure you will find if you look through the Journal of Commerce where their sailings ads appear you will never see Searsport, [23] Maine listed there. I doubt you will find it on their sailing cards that they send to their customers soliciting cargo.

It is just when this complaining shipper is crying to get a ship into this port to pick up a few hundred tons of newsprint and Maersk can work it into its schedule they do him a favor and go in there and pick it up. They have not done that since the order in Docket 1155 so that they have not held themselves out to charge the Far East Con-

ference surcharge at Searsport.

They have not held themselves out to serve Searsport at all and they have not in fact carried cargo from Sears-

port to the Philippines.

As the District Court in New York found—they have not violated. They can continue that course and they will not violate. So any suggestion that the Far East Conference has poor, little old Maersk like this (indicating) and is saying—you have to violate the order in Docket 1155, is utter nonsense.

[25] * * *

The Chairman: And you mentioned the APA—do you believe that the APA required notice? You stated that APA required notice in such proceedings. Do you recognize that this requirement has any flexibility?

Mr. Turk: Oh, yes indeed. I do not think it takes us back to the common law pleadings where

a very elaborate ritual was established as to what the complainant must say in a complaint in "X" kind of case and what kind of an answer must be filed to make that non-demurrable, and so forth.

No, but all that we were told was that we decided 1155. We lost the case in the District Court. Show us cause why we should not disapprove your agreement.

You can see when you read Hearing Counsel's argument as to why all that is so. There were some thoughts going around in somebody's head as to why that was true, but the first we heard of it was after our opportunity to put in papers had expired.

The Chairman: Do you agree or disagree that the requirement of APA has been met if the notice amounts to a general summary of the matters in this issue here?

[26]

Mr. Turk: Yes, if it really tells you what the matters are that are at issue but I contend very strongly that just saying we think you violated a section of the Act and not giving us any inkling as to why you think that—I don't think that is adequate notice.

The Chairman: Do you believe that the Conference, your clients, has been given ample notice? They have full knowledge of this surcharge, have they not?

Mr. Turk: Oh, they certainly have.

The Chairman: And also full knowledge of the surcharge and full knowledge of the surcharge problems.

Mr. Turk: Surely. We know that there is a surcharge. There have been a lot of arguments made about it and that last February you held that the Conference was perfectly all right on the surcharge.

The Chairman: If this is true, would you agree that

the order is broad enough or that the order contains an adequate summary of the pertinent evidence?

Mr. Turk: No. no. Mr. Patterson.

The Chairman: That is the point I wanted to get clear. It is a very fine line that you draw in my mind and I wanted to find out where it is inadequate in terms of pertinent evidence, on two counts.

One that you agree that the Conference had knowledge of the surcharge problem, if they had full knowledge of it.

[27]

And two—if this order contains, or does not contain, an adequate summary of the pertinent evidence.

I want to know where it is weak in your opinion.

Mr. Turk: It is weak in this. What does it tell us? It tells us that you had a case known as Docket 1155. We knew that. We went through it and we knew that we came out of it with an order which vindicated the Far East Conference.

Up to that point you have told us nothing which gives us any notice of a reason why any part of our Conference Agreement should be amended. You tell us that Maersk was ordered to do something. We knew that. We were served with the order.

Maersk filed something with you telling you how it was complying with the order. You didn't think that was good enough and you went to the Court to get an order of the Court enforcing as to Maersk. We knew all that. It has nothing to do with us.

The Court ruled that Maersk had not violated your order in 1155. We were rather happy when we saw that decision. We knew that would happen. That still is no reason why you should disapprove our Agreement or modify it in the slightest.

Now, Maersk on three occasions-thrice did they offer

him a crown and thrice did he refuse it—petitioned the Far East Conference to eliminate the Searsport surcharge [28] in order to allow Maersk to comply with the order and was not permitted by the Conference to make the change and could not comply with the order—well, I think I have explained why in my humble judgment that was nonsense because Maersk had not needed any action by the Far East Conference in order to comply with the order.

So up to that point—and that is all we got by way of notice of matters of fact—I say you told us nothing as a reason for making a finding which would entitle you to disapprove or order modified Agreement 17.

The Chairman: Mr. Turk, do you agree, or disagree, that the findings made in Docket 1155 are factual, and

speak for themselves?

Mr. Turk: I think that he who reads can learn something from them. I don't think that they are in accordance with the evidence as far as they make a finding of unjust discrimination between Searsport and St. John, or between Great Northern or Van Reekum, or whatever this thing is, and its competitors.

If the Far East Conference had been a party aggrieved by the order in that case I might have recommended to

them that they seek to review. I don't know.

The Chairman: Would you agree, or disagree, that this Commission can use these facts before us?

Mr. Turk: You can use them but I think having [29] found in February of 1965 that on the entire record of 1155 the Far East Conference had not violated the statute, you cannot in August or September, or any other time in 1965, or '66, or '67, just do a one hundred and eighty degree turn and say on the facts in 1155 the Far East Conference did violate Section 15 without somewhat stultifying this Commission as an adjudicative agency.

I say if you want to make such a finding against the Far East Conference you have to have some new factual situation which has arisen. You must have evidence in the record on the basis of which you can make findings of unjust discrimination.

The Chairman: Would you agree, or disagree, that there would be no need for cross-examination as you alluded to this morning, that you were denied that opportunity? The Conference certainly was provided earlier with the opportunity to contest such facts as we had in

1155 and even on appeal.

Mr. Turk: Well, we certainly argued in our brief to the Examiner and in our reply to Hearing Counsel's exceptions in Docket 1155 that there was no such record of the transportation conditions existing in the trade from St. John to Manila, as compared with transportation conditions in the trade from Searsport to Manila, or as to the details of competition between Great Northern, or Van [30] Reekum, and Canadian mills as to warrant a finding of unjust discrimination.

Now remember this—these hearings in 1155 were held— I think it was January and February of 1964. The surcharge of ten dollars had gone into effect in November— I think it was—of 1963 and was reduced to five dollars in

December of '63.

The statistics as to what had happened were fragmentary and very inconclusive and we got some very interesting predictions from Mr. Carena as to what was going to happen on the basis of which Hearing Counsel made arguments in the case and even the Examiner and the Commission made things that had a resemblance to findings of fact, particularly that Great Northern was embarking upon a program of diverting its shipments from Searsport to St. John.

Well, if you will look at the figures that have now devel-

oped as to what happened since those hearings took place I think you will find, if you can make sense out of the figures that Mr. Carena has submitted, that he has listed what he calls tonnage, presumably of Great Northern and Van Reekum, shipped to the Philippines from Searsport and St. John in 1963, '64—

The Chairman: What are you reading from?

Mr. Turk: I am reading from Mr. Carena's affidavit annexed to Hearing Counsel's reply.

[31]

The Chairman: Thank you.

Mr. Turk: Particularly at page 3 of that affidavit where he sets forth 1964 shipments from Searsport and St. John you will see that he has put in January, after the SS "Mazal", St. John in parentheses.

Now, I assume that that indicates that all of these sailings which he has listed on the preceding pages for '63, this page for '64, this page and succeeding for '65 which have no parenthetical reference after them were Searsport sailings. I think that would conform his data to what we know from the Conference data.

That January sailing from St. John, SS "Mazal", was the one and only St. John shipment that Great Northern, Van Reekum, has made. Now here we have Mr. Carena sitting on a witness stand in New York in February of '64 saying I am going to tell the truth and telling us all we have made a shipment from St. John, we find it is cheaper and although we hate to hurt Searsport—these horrible conditions are forcing us to a program, a program, of shipping through Canada rather than through Searsport.

Doesn't that suggest to you that they are regularly going to ship as much as they can through St. John and only what they have to through Searsport? How can you cross-examine a man on that in February of 1964? But

today, we are in September 1965 and we see what the man has actually [32] done—he has not had another shipment out of St. John.

So, apparently he has been shipping quite a bit out of Searsport, Maine, and I would like to talk to him about that a little bit, about the validity of his crystal ball.

The Chairman: Mr. Turk, you stated this morning that this order was inadequate in many respects and I gather one of them alluded to the fact that the proceeding is defective because there is denied the opportunity for cross-examination guaranteed by the Administrative Procedure Act.

Mr. Turk: That is right.

The Chairman: So what you are saying is that if you had that examination you would challenge this paper.

Mr. Turk: Yes, I would like to confront Mr. Carena.

The Chairman: Do you hold that the Administrative Procedure Act requires a full evidentiary hearing and full opportunity for cross-examination under all circumstances?

Mr. Turk: As I said before, not under all circumstances. I think that if you have an issue which is capable of resolution just by reading a piece of paper, a Conference Agreement—

The Chairman: Primarily for disclosure of facts.

Mr. Turk: Yes, when you have factual issues, as I have been arguing here—there are great factual issues [33] involved now.

The Chairman: That were not in 1155.

Mr. Turk: If they were in 1155, at that time they were resolved favorably to the Far East Conference and we had no basis for challenging the findings that were made there. I think now, for the first time—

The Chairman: You were given the opportunity to

contest such facts, were you not?

Mr. Turk: Yes, we were given the opportunity as of

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Oral Argument on Behalf of Maine Port Authority

February, 1964 to cross-examine as to the facts which existed up to that time and we argued to you that on the basis of those facts you could not find discrimination.

You did find discrimination and we thought you were wrong. But you didn't find discrimination as to us so we couldn't challenge you in Court.

Now, you cannot euchre us out of the opportunity—when now suddenly you are focusing your cannon at us, at our head—and say, no, you cannot challenge that now.

The Chairman: When you say "us" and "our" you are talking about Maersk Line versus the Conference, is that what you mean?

Mr. Turk: No, no—I am talking about the honorable Commissioners on the podium there. You cannot now after a lapse of all this time—we were sitting back and feeling happy, thinking we had won a case—turn around [34] and say, you are just about to lose that same case and we are not going to give you any chance to prove why you shouldn't.

The Chairman: That is all, thank you.

Mr. Langlois, you may proceed.

Mr. Langlois: Thank you, Mr. Chairman.

Mr. Chairman, and members of the Commission—my name is Edward Langlois, General Manager of the Maine Port Authority. My statement will be brief.

Because of their geographical location Searsport, Maine and St. John, New Brunswick, Canada are competitive in the solicitation of ocean cargo. As there is no surchage on cargo leaving St. John destined for Manila this puts an unfair burden on the Port of Searsport and the present users of this port.

The largest shipper and user of the Port of Searsport is a Maine industry, the Great Northern Paper Company. As Great Northern has developed sales in the Philippines,

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they have been placed at a disadvantage at increasing sales because of this surcharge which their competitors in Canada who use the Port of St. John are not subjected to.

Already a shipment of Great Northern Paper has been diverted to St. John and Great Northern has indicated that if the surcharge remains and in fact is increased from the present \$5.00 a ton to \$10.00 a ton they will use the Port of St. John.

[35]

Our position is simple.

The Maine Port Authority does not seek to break up the Far East Conference.

We do ask that the Commission disapprove rate making authority as it applies between Searsport and Manila, or disapprove it as it applies only to newsprint from Searsport to Manila.

That is my statement, gentlemen.

The Chairman: Commissioner Barrett, do you have any questions?

Commissioner Barrett: Why do you limit it to only newsprint? Is it because that is the only cargo that goes through Searsport?

Mr. Langlois: At the present time. Searsport is a very small port in Maine and at this time newsprint is the only cargo going to Manila.

Commissioner Barrett: Suppose canned goods, or lumber, or something else would go from Searsport to Manila, would you still just hold to newsprint?

Mr. Langlois: We have given an "and" and an "or". We have attempted in the past year—two years—since this trade began to attract other cargo from Maine and from New England but we have a great many small manufacturers in the State of Maine, none of whom produce the cargo great enough to attract a ship on its own.

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[36]

Therefore, when we have Great Northern shipping and enough tonnage to attract a vessel we attempt to get some small manufacturers to go into this trade and use the Port of Searsport, rather than to ship seven or eight tons, or ten or twenty tons to New York, Boston, or Baltimore.

Commissioner Barrett: Thank you, sir.

The Chairman: Commissioner Day?

Commissioner Day: Mr. Langlois, for all practical purposes do you consider Maersk Line a common carrier out of Searsport? Mr. Turk made reference to the fact that—although he did not state it definitely—they did not hold themselves out to be a common carrier. But in the opinion of the Port itself is Maersk considered a common carrier?

Mr. Langlois: Well any carrier—we have a difficult time to get vessels to come into Searsport because they are not on a scheduled run and we would have to say that Maersk would [not]* be considered a common carrier.

Commissioner Day: You would agree with Mr. Turk's statement, based on the fact that they do have a hard time getting ships to stop at Searsport, that for all practical purposes their listing in the Digest, and so forth, did not give the interpretation of being a common carrier per se.

[39] * * *

Commissioner Hearn: You had one cargo of Great Northern diverted from Searsport to St. John this year. Is that what you said?

Mr. Langlois: The statement of Mr. Carena indicates that one cargo in 1964 was diverted to St. John.

Commissioner Hearn: How about '65? Do you know what has happened since the order went out in February?

^{*} Erroneously omitted from original transcript.

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Mr. Langlois: In 1965, no cargo of Great Northern has been diverted to St. John.

Commissioner Hearn: In other words, that cargo was the cause, I suppose, for eight ships arriving and sailing from Searsport.

Mr. Langlois: Right.

Commissioner Hearn: So you have been exporting this paper from Searsport on eight Conference vessels, is that right?

Mr. Langlois: That is right.

Commissioner Hearn: Do you consider that service adequate, or inadequate?

[40]

Mr. Langlois: I feel, and I am sure Great Northern feels, that as long as a vessel is there to pick up the cargo when it is ready to leave that this is adequate.

The Chairman: On call. Mr. Langlois: Yes, sir.

The Chairman: Could I ask you if it is believed that the findings that were made in 1155—this Commission made its findings based on the facts in that docket—and because of the apparent apprehension that you have in this area of service to Searsport—you did not elect to participate in 1155?

Did you know about it? Did you you elect not to par-

ticipate at that time?

Mr. Langlois: I must be honest with you. We were not aware of the seriousness of the situation at the time and I would suspect that perhaps the main reason being that at that time Great Northern who was the principal user [41] did not indicate to us that they wished us to testify for or against.

The Chairman: Great Northern said that to you.

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Mr. Langlois: No, no. We had not been in contact with

Great Northern Paper Company.

The Chairman: I thought you said that Great Northern Paper Company indicated to you that they did not have a desire for you to intervene in the case, for or against. Is that right?

Mr. Langlois: No.

In answer to your question you asked if we were aware of it. I am saying to you that we were not aware of it to that extent.

The Chairman: To what extent were you aware of it? Mr. Langlois: I think our first awareness was reading it in the newspaper.

The Chairman: Reading about it in the newspaper.

Mr. Langlois: Yes, sir.

[45] * * *

Commissioner Hearn: We ordered Maersk Line to take out what?

Mr. Kline: We ordered Maersk Line-

[46]

Commissioner Hearn: We ordered them not to discriminate between Searsport and St. John, not to take the surcharge out.

Mr. Kline: Specifically we ordered them to cease and desist in assessing a surcharge at Searsport.

[52] * * *

Mr. Turk: If I may, I think it is a passage in Judge Bonsal's opinion to which Mr. Kline is referring and it appears in a paragraph beginning about two-thirds of the

way down on page 5 of the opinion; Judge Bonsal's opinion.

Mr. Kline: Yes. It says-

If the Commission believes the Conference surcharge approved in the proceeding above mentioned is now un-

reasonable it is free to re-open the proceeding.

Commissioner Hearn: That is right, but you didn't say that. You said that they should proceed against the Conference. We would then have to change our decision approving the surcharge. That is what he said. That is a completely different horse.

Mr. Kline: He says-

If it so finds, to direct the Conference to [53] remove

the surcharge.

Commissioner Hearn: Sure, if the Commission now feels that its decision granting the surcharge is wrong now, then it can direct the Conference not to charge it.

Mr. Kline: That is right.

Initially I will state that the Ab Svenska case told the Commission to make findings on the basis of Section 15 of the Shipping Act. We have no disagreement with that. The proceeding has been re-opened and the Commission has been directed to make such findings and the Commission will make such findings.

No one is going to dispute a finding of unjust [54] discrimination or violation of Section 15 should be made on

the criteria established by Section 15.

But the proposition that we need an evidentiary hearing and we need cross-examination is something with which I cannot agree on under this type of case.

Commissioner Hearn: You don't have to. I just wanted to get your trend of thinking. As we get around again to the point—do we have the right respondent here?

Mr. Kline: Well, yes.

Commissioner Hearn: What under Section 17 can we [60] do to Maersk? This is what I would like to know.

Mr. Kline: We cannot order Maersk to take that surcharge off because Maersk is stuck with the Conference's tariff. We have to go against the Conference, which is what we are doing here.

Commissioner Hearn: I understand that.

Mr. Kline: As the Court suggested-

Commissioner Hearn: You cannot order Maersk to put a surcharge on St. John.

Mr. Kline: That is right. You have no jurisdiction there.

Commissioner Hearn: It might be moot since Maersk hasn't chosen to serve Searsport since this order came out—if we found Maersk is the discriminator against the American exporter, the shipper, can we strike at Maersk to prevent Maersk from serving at Searsport?

I say it is moot because they don't choose to serve it.

[61] * * *

Commissioner Hearn: This gets down to a very—you used the word helpless which I will not use—difficult situation vis a vis the broadness of the Commission's jurisdiction over what has taken place here. Is this correct?

Mr. Kline: Well, it is very simple. The underlying cause of the situation is the Conference's action. We have to proceed against the Conference to eliminate this discrimination.

Commissioner Hearn: Wasn't the underlying cause the Commission's approval of the surcharge?

Mr. Kline: Well-but the Commission did not-

Commissioner Hearn: If you lift this surcharge at Searsport what about the shippers from Boston, Phila-

delphia, New York; Portland, Maine?

Mr. Kline: That is a legitimate question. There is no showing, first of all, that there is competition between New York and Boston, and even Portland with Searsport. Searsport is, as Mr. Langlois has stated, a small port. It ships almost everything. Newsprint is shipped out of there.

You might say suppose—as has been raised by Mr. Turk—you take the surcharge off of Searsport. Is this going to cause all the other ports to start screaming—we

[62] want you to take it off of us, too.

That necessarily is not true. They would scream if there was a diversion from Portland and Boston and New York to Searsport but there is no showing that that sort of thing is going to happen.

Commissioner Hearn: Not when they all have the same

surcharge.

Mr. Kline: I will proceed.

Searsport is a small port. We do not know if it could

handle any diversion from New York or Boston.

Secondly, we don't know even in Portland, Maine—which is the nearest sizable port to Searsport—that there are any shipments to Manila, newsprint or anything else, which would suddenly be diverted to Searsport because the surcharge was removed from Searsport.

In other words, there are all sorts of things that are not shown here. Searsport is a small port, handling newsprint to the Far East and to around the world and to

Manila. All we are asking is to take the surcharge off Searsport only as it applies to the Manila trade, not to all the other trades.

Why is a shipper from Portland, or from Boston going to ship something up to Searsport, Maine unless that shipper was also shipping newsprint to Manila on which there was a surcharge.

[63]

As far as we can see Great Northern is the only one shipping newsprint from the State of Maine in that part of the country and anything Great Northern ships is out of Searsport, not out of Portland.

There is no showing that there would be any diversion from one port to the other. There is no showing that Portland and Boston are competitive with Searsport. Boston and New York and even Portland are more sizable ports than Searsport.

Commissioner Hearn: Under the gravamen of this case, or under what you are discussing, there is no showing one way or the other, depending on what side of the fence you are on.

I would like to know if you could find, or if in your opinion you found a carrier that is discriminating under these facts—and I am not saying right here and now what I think—suppose you have a carrier that is quoting two different rates, one at St. John and one at Searsport you might say there is discrimination.

If that carrier is discriminating, and you find it under Section 17, what, if anything, could we do? You, as the representative of the public interest, what could be done? Should the carrier be stricken not only from service to Searsport if he should choose to serve there now, but he

would be stricken from going into any port on the East Coast of the United States.

[64]

What action can this Commission take to go after an alleged discriminator, a carrier?

Mr. Kline: Order him to cease and desist in discrim-

inating, which is what they did.

Commissioner Hearn: That is exactly what we have done.

Mr. Kline: That is right. Now the trouble here is that you ordered them and they could not comply because the Conference would not let them. They are compelled by law to stick to the Conference tariff. Now, the solution is to go against the tariff and—

Commissioner Hearn: This tariff which quoted an approved surcharge by the Commission—this is the point

that I cannot seem to get over.

Mr. Kline: You reiterate that the Commission approved the surcharge but the Commission did not approve a surcharge at Searsport.

Commissioner Hearn: We approved the Conference's

right to quote it if they so desired.

Mr. Kline: Yes, but not from Searsport to Manila. That's the difference. The surcharge is okay but—

Commissioner Hearn: Not specifically from Searsport to Manila but specifically in the various ports that the Conference serves, or the members thereof serve. That is considered an approval of the surcharge from Searsport as well [65] as from any other port on the East Coast, is it not?

Mr. Kline: Well, there is a confusion here—if it does exist you can clear it up now.

Commissioner Hearn: I am completely confused. Have

you been telling me that we did approve a specific sur-

charge from Searsport to Manila in 1155?

Mr. Kline: As charged by Maersk Line and Pacific Star—let's take the Maersk Line because they are in the Conference—you said in 1155 that surcharges are approvable under the Shipping Act all up and down the Atlantic and Gulf ports.

However, we do not like the assessment of a surcharge by Maersk out of Searsport. We want that eliminated.

Commissioner Hearn: No, we didn't say that. We said that we don't like the discrimination. This is the point—we didn't say that we don't like the charge of a surcharge by Maersk out of Searsport. We ordered Maersk to cease and desist discriminating against Searsport. But we approved the surcharge.

You have four or five other Conference carriers quoting a surcharge and charging it out of Searsport, as Mr. Lang-

lois said here this morning.

Mr. Kline: The source of discrimination, as found to exist in 1155 and as found to be practiced by Maersk; the source of discrimination was the surcharge that Maersk was [66] forced to apply at Searsport because it is a member of the Conference.

So the discrimination and the surcharge by Maersk are one and the same thing. The reason for discrimination is the surcharge by Maersk.

Commissioner Hearn: By Maersk, that is right. There

is another out here.

You have a Conference with five Conferee members that have been serving there. They are not charging the surcharge which they are entitled to charge because they are in the Conference and the Conference certainly doesn't serve St. John.

Therefore, these other five Conferee members are not serving there. Maersk Line has chosen to discriminate

against American trade because it serves both and does not impose the approved surcharge out of Searsport to St. John. That is the problem here, is it not?

I am asking you what you recommend could be done since it might be said to be the opinion of some people that the discriminator is Maersk and not the Far East Conference.

Mr. Kline: I am saying that the discriminator here and the actual instrumentality of discrimination here is the Maersk Line and any other line that calls at both St. John and Searsport.

Г671

They are the actual arm, the agent, the instrumentality, the ones who are doing the discrimination. We want to remove that.

Commissioner Hearn: Right.

Mr. Kline: What is the cause of it? Why do they have to keep doing it? What is the underlying cause of this?

The underlying cause is the refusal of the Far East Conference to amend their tariff from Searsport to Manila.

Commissioner Hearn: And I am saying to you, if a part of your argument is bought, you as the representative of the public interest—what can be done if only Maersk is found to be a discriminator here, and not the Conference?

Mr. Kline: Only Maersk?

Well, the only thing that I can see that could be done, if Maersk is the only one and not the Conference is found to do this—the only remedy I can see is to amend the Conference tariff, or order Maersk to leave the Conference. I don't know if the Commission can do that.

Commissioner Hearn: That is what I want to know. You don't know whether the Commission can do that.

[78] · · ·

Commissioner Barrett: Has the violation by Maersk, [79] as found in Docket 1155, ceased because Maersk no longer serves Searsport? Do you think it has ceased?

Mr. Kline: Here is how I will answer that. As the Court said up in New York, since Maersk is not serving the two ports since the Commission's order it cannot be found to have violated the Commission's order.

[87]

Commissioner Hearn: That is an attitude which is looking toward approval in this case and in other cases. We would like to make a solution of this problem right now for all time, if possible.

What would be wrong with lifting a surcharge on newsprint anywhere on the East Coast? Would that be a bet-

ter way to get at it? Or could you do that?

Mr. Kline: Well, firstly, you could—but here is the trouble. Firstly, the reason why we are concerned on this newsprint problem is because one shipper, Great Northern located in Maine, is suffering competitive harm.

If you are going to remove a surcharge from, let's say, Tampa, Florida—what is the sense in that? Is there a newsprint shipper down there from Panama City who is using those ports, who is suffering from competition from a Canadian competitor, and he has to be relieved? We don't know this.

We know there is in Searsport. There is no reason to

go looking in other ports.

Commissioner Hearn: The point is—why should a cargo of pulp paper be a preferred item out of Searsport, and nowhere else?

Mr. Kline: Because we find evidence that there is harm being inflicted upon an American exporter there.

Commissioner Hearn: Okay. Still, your point is [88] that we jump over the discriminatory claim of anybody else merely on the basis of diversion from one port?

Mr. Kline: Well, that is what the Court is worried

about. Is this a legitimate-

Commissioner Hearn: I know that is what the Court is worried about, but what about the other ports?

Mr. Kline: Well-

Commissioner Hearn: If you go from one prejudice or one discrimination into another in an effort to alleviate——

Mr. Kline: Well, if you say—if you take the surcharge off Searsport, what harm is going to result to these other ports? What harm is going to result to the Port of New York because there is a surcharge removed from Searsport to Manila? Are the New York shippers going to send all their commodities, in millions of tons, up to Searsport because there is a surcharge that has been removed on newsprint from Searsport to Manila?

That is incredible.

Commissioner Hearn: It is incredible but there are not millions of tons. We are talking about a very small amount of cargo, if these facts are to be given any credence.

We are talking about the whole East Coast. In 1963, three hundred and twenty-six thousand tons. That is total revenue, bulk excluded, and that is the Atlantic and the Gulf.

[89]

In 1963, just the Atlantic, it was two hundred and fifty-two thousand tons.

Now that is the point, the original point that I am making. Who is to say whether or not there will be diversion? And that will be the opening of another case.

Mr. Kline: I will say——

Commissioner Hearn: I don't think that will be in the

public interest at all.

Mr. Kline: I think Mr. Langlois is an expert on Searsport, and he could answer that, but to my mind, to even consider that there are two hundred and fifty-two thousand revenue tons, bulk excluded, moving from all the Atlantic Coast, and there is some danger that two hundred and fifty-two thousand tons is suddenly going to be diverted from the little port of Searsport which handles about six or strength to thousand tons a year is so remote that I think it should not be of any concern if the Commission wishes to remove the surcharge at Searsport.

It is just incredibly improbable that there would be a diversion from a little port like Searsport from some

shipper in the middle of the country.

Commissioner Hearn: Let's not say that. That is a diversion argument. But why does the shipper of newsprint going to Manila out of New York have to pay ten dollars more, or five dollars more than a fellow out of Searsport? Is [90] this merely because of a diversion problem?

We are getting back to the "helpless" situation and we don't want to confound any more problems because of this situation where we have a Conference not serving, and quoting a rate, and I am wondering whether they are

the initial malefactor.

Well, that is all I had to ask you. Thank you very much.

The Chairman: Mr. Kline, you did not participate in 1155.

Mr. Kline: No. That was Mr. Matias. He is no longer with the Commission.

[95] * * *

Mr. Turk: I don't know about that, Commissioner Day. During the argument this morning there has been suggested in my mind an interesting thought here that bears on this general problem of how what you do with respect to Searsport may affect some of these other ports.

From Mr. Dennean's affidavit and the attached Exhibit it appears that during 1964 there was lifted at Searsport, Maine destined for the Philippines newsprint in the

amount of 3,943 tons.

Page 3 of Mr. Dennean's affidavit shows that the total Conference carryings to the Philippines of newsprint for 1964 from Atlantic Ports was 7,105 tons.

Now, there is some other port, or ports, contributing a little over 3,000 tons of newsprint moving to the Philippines. So to the extent that newsprint, and newsprint shippers and other ports have competitive interest here—there are two points that emerge.

[96]

One is that if you do tinker with the surcharge at Searsport you are affecting something—it may not be tremendous, but I do not think that we are allowed to take a de minimis non curat Commission attitude here.

You are affecting competitive shippers and competitive Atlantic Ports.

I think that also these figures raise the question as to why if Great Northern finds that the surcharge is hurting its competitive position, why is somebody else apparently doing better? The somebody else also has to compete with the Canadian mills.

Another point that I would like to take up with Mr. Carena in that witness chair is what I have just mentioned.

[97] * * *

Now, some reference was made to another Conference member serving St. John, Canada. I haven't committed the record in Docket 1155 to memory but I think page three of the Examiner's initial decision confirms my recollection that States Marine—Isthmian Line actually—testified that occasionally as part of its round-the-world service it does call at Halifax, Nova Scotia to pick up cargo which winds up at Manila.

But I recollect no indication that it calls at St. John and I think that the testimony—I believe it was Mr. Sullivan of the Isthmian organization—was that on the cargo that they pick up in Eastern Canada, and I am quite sure it is limited to Halifax, they do assess the same surcharge as the Far East Conference charges.

[101]

Mr. Kline says—we do not know whether Searsport can handle more cargo. We do not know whether there would be any diversion to Searsport if we tinker around with the surcharge.

Again I say that is why you should not do anything until you have hearings and an opportunity to know something about what the consequences of your act will be.

The question was posed—what can the Commission do to a discriminator? Well, I think that what you did with respect to Maersk in the District Court is the answer to that.

If Maersk, or anybody else, commits a discrimination after you have ordered them to cease and desist, you take it to Court. He has violated your order. You get a Court order telling him not to violate and if he does it again, he is in contempt and the Court raps his knuckles with some

money payable to the United States. I think that is the answer.

Up to this point Maersk has done nothing which would move the Court to issue an injunction.

[105] * * *

Mr. Turk: I argued consistently that there really was not a proper basis for a finding of discrimination and I think that if you re-opened 1155, or started another proceeding to look into the current situation, that the facts would develop that there is no unjust discrimination.

There is one other passage in the transcript in 1155 which I think shows you why I am sort of itching to have another talk with Mr. Carena—and that is that he has laid all his troubles at the door of this surcharge but he was asked, not by me, I don't think. I forget who it was—I will not go into that.

- "Q. Are you aware or do you have any knowledge"——This is on page 725 of the transcript in Docket 1155.
- -- "to paint as rosy a picture of conditions in Manila as they could?"
- "A. I don't belive there is any pressure on them but the importers today are in the enviable position of being able to pretty much dictate their own conditions. Because if we cannot give them their paper at the price and conditions that they want, they probably can get another half dozen that will do it. So that I wouldn't say that there was any pressure put on them to make a rosy picture unless they were trying to impress me."

"Q. When you say that they can get their terms and conditions from others, do you mean other exporters in the United States? A. Well, let me explain it to you in this way.

There was a time in Manila when you didn't sell anything except on a letter of credit basis; that is, as far as newsprint is concerned. We are a rather conservative organization,"——

Now he is talking about his Great Northern hat.

-"and we just won't take positions in the Far East."

That is explained a few lines down.

—"But if those conditions of letter of credit still prevail, I have absolutely no need of Van Reekum Paper [107]

handling my exports for the Philippine Islands.

"Today the payment situation, for example, and I think Mr. Andre can tell you that better than I can—because I don't get involved in it—I would say they have deteriorated to the point where you are waiting for your money possibly 90 or 120 days. That is the reason we use Van Reekum. We just bill them and the bills are payable on a certain date, and we are through with it."

Then I-this was my questioning.

"A. ". . . You have those in Canada, today, that are in the Philippines that were never there before, and they are there for the reason that they are willing to take a position"——

That is give open credit rather than insist on letter of credit payment in advance.

—"that have generally resulted in the gradual deterioration of both price and selling terms in that market."

That is in the Philippines.

So I think that Mr. Carena's trouble may stem just from the fact that he isn't willing or able to meet the Cana-

dians on price and credit terms. There was support for that in the data which the American Steamship Traffic Executives Committee put in before the Bonner hearings last summer. That is in this review of dual rate legislation, [108] at page 608, where it is shown that the FAS volume* of newsprint exported to the Philippines from the Maine-New Hampshire Customs District went up almost six dollars, from 1963 to 1964.

FAS, of course, doesn't include the surcharge or the freight rate. So apparently Great Northern jacked its price up by more than the amount of the surcharge which you cannot lay to our door.

^{*} Thus in the original transcript; should be "value."

[1]

[SAME TITLE]

Agreement No. 17, the organic agreement of the Far East Conference, found to operate in a manner which is unjustly discriminatory and unfair as between ports; between exporters from the United States and their foreign competitors; detrimental to the commerce of the United States; and contrary to the public interest.

Far East Conference ordered to open rates on newsprint from Searsport, Maine to Manila, Republic of the Philippines.

Elkan Turk, Jr., for respondent, Far East Conference.

Edward Langlois for intervener, Maine Port Authority.

Norman D. Kline and Robert J. Blackwell for Hearing Counsel.

REPORT

By THE COMMISSION: (John Harllee, Chairman; Ashton C. Barrett and James V. Day, Commissioners)

This proceeding is before the Commission upon an order directing the Far East Conference to show cause why its organic agreement (F.M.C. Agreement No. 17) should not be amended to remove the Port of Searsport from the trading range of the conference.

The Commission directed this order to the conference

because it appeared that the applicable tariffs of the conference result in a situation which is detrimental to the commerce of the United States, contrary to the public interest, and otherwise in violation of the Shipping Act, 1916.

This proceeding is the outgrowth of an earlier Commission investigation in Imposition of Surcharge on Cargo to Manila, Republic of the Philippines, F.M.C. Docket No. 1155 (February 3, 1965). The Commission instituted Docket No. 1155 to investigate the lawfulness of surcharges on cargo moving from ports in the United States to Manila, Republic of the Philippines. The purpose of the proceeding was to determine whether the surcharges were contrary to section 15, 16, 17, and 18(b)(5) of the Shipping Act, 1916.

[2]

As far as pertinent here, the Commission named as respondents the Far East Conference and its members. The Far East Conference serves Manila from United States Atlantic and Gulf ports, but this range of service does not include Canadian Atlantic ports. Maersk Line, however, a Far East Conference member, serves Canada to Manila as an independent.

The Far East Conference on July 25, 1963, filed with the Commission surcharges of \$10 per ton, as freighted, on cargoes destined for discharge at Manila, to be effective October 28, 1963. The amount of the surcharge has fluctuated since, but a surcharge is still in effect at Manila and is scheduled to be increased from \$5 to \$10 per ton on January 1, 1966.

In Docket No. 1155 the Commission held that carriers operating from the United States to Manila were justified in imposing a surcharge on cargo unloaded at the Port of

Manila, because of the extraordinary delay occasioned by labor difficulties and port congestion. Nevertheless, the Commission found that respondent, Maersk Line, by imposing a surcharge on newsprint at Searsport, Maine, while not applying a surcharge at St. John, New Brunswick, Canada, demanded, charged, and collected a charge which is unjustly discriminatory between shippers and ports and unjustly prejudicial to exporters of the United States as compared with their foreign competitors contrary to section 17 of the Shipping Act, 1916.

In conjunction with this holding, the Commission dis-

cussed the matter in its opinion as follows:

"The Great Northern Paper Company is an exporter of paper and newsprint, competing with Canadian mills for the Philippine market. It has traditionally shipped its products from Searsport, Maine, where the surcharge is applicable. Canadian competitors, shipping from Eastern Canada, pay no surcharge in the Philippine trade. Newsprint is a low-rated commodity with a small margin of profit. During the first nine months of 1963, Great Northern shipped about 700 tons of newsprint a month but none was shipped in November and December. Since Great Northern can avoid the surcharge by utilizing Canadian ports and thus maintain a competitive position in the Philippines, it has embarked on a program of diverting newsprint from Searsport, Maine, and has now begun to export from the Canadian port of St. John. This diversion to Canada is not without some expense to Great Northern, and it deplores the inability of Searsport [3] to handle this cargo. Great Northern's business is so competitive in the Philippines that it has not been

able to pass on the entire surcharge to its customers, and it lost sales totaling about 1400 tons of paper in November and December 1963 that were

made by Eastern Canadian mills.

"These facts establish that Pacific Star Line and Maersk Line by assessing a surcharge on newsprint at Searsport, Maine, while not at Canadian Atlantic ports, have unjustly discriminated against Great Northern and the Port of Searsport while advantaging Canadian shippers of newsprint and the port of St. John. We find that a sufficient competitive relationship exists between the shippers and ports concerned; we find that Great Northern and the Port of Searsport have suffered pecuniary harm by the imposition of the surcharge and the resultant diversion of traffic, and we find that the transportation conditions are similar from St. John and Searsport. Pacific Star and Maersk, therefore, have demanded, charged, and collected a charge which is unreasonable. We find this conduct to be contrary to the provisions of section 17, which provides that no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors.' West Indies Fruit Co. v. Flota Mercante [7 F.M.C. 66 (1962)]. Grays Harbor Pulp & Paper Co. v. A. F. Klaveness & Co. A/S, 2 U.S.M.C. 366, 369 (1940). We will order these carriers to cease and desist from this unreasonable practice by removing the inequality of treatment between shippers and ports by appropriate tariff amendments."

To implement this result, the Commission directed Maersk to end the discrimination by some appropriate tariff action.¹

After issuance of the Commission's decision and order, Maersk applied for an extension of time to comply. The Commission rejected the request by order of February 19, 1965. In denying the petition, the Commission stated:

"There can be no doubt that Maersk must comply with the terms of the original order. Certainly, a request for additional time to decide whether to seek reopening or to petition for appellate review cannot operate as an automatic stay of our order requiring the elimination of a demonstrable discrimination. Indeed, the filing of either does not have that result.

"Nor can their pleas that compliance is difficult in light of their obligations as members of the Fast East Conference and as parties to Agreement No. 8200 with the Pacific Westbound Conference alter our rejection of this request for enlargement. Maersk Line is directed to end the discrimination set out in our opinion. No obligation of a conference member can delay the elimination of action which is contrary to a statute of the United States. Conferences, which

¹ The order provided as follows:

[&]quot;IT IS ORDERED, That respondents Maersk Line and Pacific Star Line cease and desist from assessing on newsprint moving from Searsport, Maine, to Manila, Republic of the Philippines, a surcharge which is prejudicial and discriminatory to exporters of newsprint from the United States and to the Port of Searsport, Maine;

[&]quot;IT IS FURTHER ORDERED, That respondents Maersk Line and Pacific Star Line shall notify the Commission within 15 days of the date of this order the manner in which they shall eliminate such prejudice and discrimination."

exist pursuant to our section 15 approval, must not only cooperate fully to eliminate discrimination but, indeed, we expect them to take the lead to such end. "For these reasons, we deny the request."

Still Maersk failed to comply. Thereafter, upon application of the Commission to the United States District Court for the Southern District of New York, Maersk was directed to show cause why an order should not be made by the District Court pursuant to section 29 of the Shipping Act to enforce obedience by Maersk to the Commission's order of February 3, 1965. In subsequently ruling upon that order to show cause, the District Court on July 13, 1965, refused to enter an injunction against Maersk on two grounds: (1) That Maersk was not serving Searsport and, therefore, it was not necessary that it change a rate applicable at that port, and (2) That Maersk, having on three occasions petitioned the Far East Conference to eliminate the Searsport surcharge in order to allow Maersk to comply with the order and was not permitted by the conference to make the change, could not comply with the order.

Therefore, the Commission is confronted with the problem of how to alleviate the discrimination against Searsport and against shippers and exporters who desire to use the Port of Searsport. To be sure, the discrimination we found in Docket No. 1155 remains. A surcharge is still imposed at Searsport and no surcharge is imposed at St. John. The fact that Maersk does not serve both ports does not obviate this discrimination. The significant fact is that a Far East Conference member calling at Searsport must assess a surcharge. Thus Searsport is at a disadvantage compared to St. John whether Maersk calls at either port or not. And the direct causation of the disadvantage is the Far East Conference.

[5]

Briefly, it is the conference whose refusal to amend its tariff that compels the continuance of a situation which has been found to be a violation of section 17. Although the actual instrumentality of discrimination was Maersk in serving both Searsport and St. John, the underlying responsibility for the continuation of the discrimination rests with the conference. Since the conference refuses to amend its tariff, we will amend it for them. We hereby order the Far East Conference to open the rate at Searsport on newsprint destined for Manila.

While the Order to Show Cause which initiated this proceeding contemplated striking Searsport from the range of the conference, we have decided upon a less drastic course. We will leave the conference intact at Sarsport, but order the conference carriers to set rates on newsprint independently at that port. Sections 15 and 22

are our authority for this action.

We must find, in order to invoke section 15, that an agreement between common carriers subject to our jurisdiction operates in a manner that is unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of the Shipping Act.² We hold that the Far East Conference

² Section 15 provides:

[&]quot;The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of

agreement has operated in a manner which is unjustly discriminatory or unfair as between ports and between exporters from the United States and their foreign competitors. In addition, we find that the agreement has operated in a manner which is detrimental to the commerce of the United States and contrary to the public interest.

[6]

Initially, we take note of certain of the provisions of the organic agreement, approved by us, which permits the conference members to act collectively. The preamble to Agreement No. 17, approved November 14, 1922, provides:

"That the parties hereby associate themselves together in a Far East Conference to promote commerce from North Atlantic, South Atlantic and Gulf ports of the United States of America to Japan, Okinawa, Korea, Taiwan (Formosa), Siberia, Manchuria, China, Hong Kong, Republic of the Philippines, and the territory formerly known as Indo-China, namely Vietnam, Cambodia, and Laos, for the common good of shippers and carriers, by providing just and economical cooperation between the steamship lines operating in such trades; and to the accomplishment of that end the parties hereby severally agree with each other as follows. . . ."³

Thus, two facts are readily apparent: the conference serves the United States, and not Canadian ports and the

the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations."

³ This language is taken from Agreement No. 17-31, approved November 7, 1963, which updated the list of foreign countries served to reflect current geographic designations.

conference was intended to promote commerce, in the United States to Orient trade, for the common good of shippers and carriers. It is now appropriate to measure the operation of the agreement against its own terms and purposes as well as the terms and purposes of section 15.

First we consider the question of discrimination between ports. In Docket No. 1155, we found that Maersk by imposing a surcharge on newsprint at Searsport while not applying a surcharge at St. John had demanded, charged, and collected a charge which is unjustly discriminatory between ports contrary to section 17. Let us examine what has occurred since we entered this finding. The surcharge is still applicable at Searsport, but no surcharge is applicable at St. John. As we found in Docket No. 1155, the two ports are competitive, Searsport has suffered pecuniary harm by the imposition of the surcharge, and transportation conditions from St. John and Searsport are similar. Only one significant fact has changed; Maersk no longer serves Searsport.4 Does this fact obviate the section 17 violation? We think not. Searsport is at the same disadvantage it was [7] before. And Searsport remains at a disadvantage because the conference refused to alleviate the discrimination. On at least three occasions, Maersk requested that the conference permit Maersk to comply. The conference refused.5

⁴ By depriving Searsport of service, this simply compounds the harm to this port.

⁵ In Federal Maritime Commission v. Maersk Line 243 F. Supp. 561, 562 (S.D.N.Y. 1965) the court found:

[&]quot;Evidence has been offered that at three Conference meetings held since the issuance of the Commission's order, Maersk has moved for the elimination of the Conference surcharge, and that the motions have been lost."

The Far East Conference minutes which are required to be filed with the Commission and which are subscribed to and

Thus, one cause of the discrimination against Searsport is the refusal of the conference to remedy the situation. It would be possible for carriers to establish or permit rate parity between Searsport and St. John but for the artificial restrictions of the conference tariff. For it is the recalcitrant conference that is primarily responsible for higher rates being applicable at Searsport as well as for the curtailment of service there by Maersk. We, therefore, hold that the Far East Conference agreement has operated in a manner which is unjustly discriminatory between ports.

We consider next the issue of whether the agreement operates in a manner which is unjustly discriminatory or unfair as between exporters from the United States and their foreign competitors. In Docket No. 1155, we found that Maersk, by assessing a surcharge on newsprint at Searsport while not assessing a surcharge at Canadian

certified as being a true and complete record of all actions provide:

^{1. &}quot;Motion was made and seconded that the Manila surcharge applied on newsprint paper shipped from Searsport, Maine, be eliminated forthwith. Motion was Lost. Motion was thereupon made and seconded that the Manila Surcharge be withdrawn on shipments of newsprint paper irrespective of the port of shipment. Motion was Lost. (Meeting No. 1989, February 17, 1965.)

^{2. &}quot;Motion was made and seconded that the Manila Surcharge be eliminated forthwith on newsprint paper shipped from Searsport, Maine. Motion was Lost. Motion was then made and seconded that the Surcharge be eliminated on newsprint paper shipped from all ports to Manila, P. I. Motion was Lost. (Meeting No. 1990, February 18, 1965.)

^{3. &}quot;Motion was made and seconded, subject to concurrence of Pacific Westbound Conference, that the Surcharge be eliminated with respect to newsprint paper shipped from Searsport, Maine. Motion was Lost. (Meeting No. 1991, February 24, 1965.)"

Atlantic ports, demanded, charged, and collected a charge which is unjustly prejudicial to exporters [8] of the United States as compared with their foreign competitors. Again, nothing new has occurred subsequent to our finding except that Maersk has ceased providing service at Searsport. And again, what difference does this make? As far as the prejudice to Great Northern is concerned, it can make no difference. Great Northern is still at a disadvantage as compared with their competitors from Canada. disadvantage in large measure is the result of the conference's collective rate making. This is so because of the conference tariff requirements, pursuant to which carriers cannot treat Great Northern fairly as compared with exporters from Eastern Canada. We, therefore, hold that the Far East Conference agreement has operated in a manner which is unjustly discriminatory and unfair as between exporters from the United States and their foreign competitors.

We turn now to the issue of detriment to commerce. Are the rate making practices of the conference or the rates themselves detrimental to the commerce of the United States? It would appear that the action of the conference which results in Maersk's refusal to serve Searsport would be enough in itself to justify a holding that the conference has acted to the detriment of our commerce. This, coupled with the harm to Great Northern in its export business, is the essence of detriment to commerce. The record discloses that Great Northern, in order to remain competitive, has absorbed part of the surcharge and on one occasion diverted cargo to St. John to avoid the impact of the additional charge. The record further shows that Great Northern has lost some business to competitors using Canadian Atlantic ports. Accordingly, we find that the Far East Conference agreement has operated in a manner which is detrimental to the commerce of the United States.

We are further convinced that the agreement is operating in a manner which is contrary to the public interest. As we noted in our order denying a request for an extension of time in Docket No. 1155, we expect the conference to take the lead in ending discriminatory situations. "Conferences, which exist pursuant to our section 15 approval, must not only cooperate fully to eliminate discrimination, but indeed, we expect [9] them to take the lead to such This "suggestion" was not made as a passing remark. To the contrary, the passage represents what we consider to be the obligation of conferences under the public interest criterion. Here we have a classic demonstration of indifference to the needs of the public. While carriers wish to group together in rate making conferences for private commercial reasons, in exchange for this privilege we insist that these arrangements contribute in some manner toward public interest. As we said in Pacific Coast European Conference, 7 F.M.C. 27, 37 (1961):

> "A conference agreement is not some sacrosanct private arrangement but a public contract, impressed with the public interest and permitted to exist only so long as it serves that interest."

One would have to look hard and long to discover what contribution to the public interest has been made by the conference in their arbitrary action at Searsport.

The conference can hardly be said to have acted toward the common good of shippers and carriers nor to have attempted to promote commerce from a United States port, the purported purpose of the agreement. The Shipping Act provides a pervasive regulatory scheme. This scheme cannot be avoided by carriers hiding behind section 15 agreements. As the Supreme Court said in Federal Maritime Board v. Isbrandtsen, 356 U.S. 481 (1958)

"Congress struck the balance by allowing conference arrangements passing muster under sections 15, 16 and 17." Here the conference has shown no concern for the public interest and has actually aggravated a situation which we held to be contrary to section 17. Conference authority to set rates on newsprint at Searsport is the major cause of the current discriminatory situation. Consequently, we

will withdraw authority to set this rate.

Our remedy—to open the newsprint rate from Searsport to Manila—is authorized by law. Section 15 itself provides that we may disapprove an agreement upon a finding that the agreement operates in a manner which is unjustly discriminatory between ports or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Similarly, the Commission may modify an agreement where the agreement operates in an [10] unlawful manner. Indeed, the Commission has a duty to take such action in the face of such a finding. Pacific Far East Line v. United States, 246 F. 2d 711 (1957).

In Empire State Highway Transp. Ass'n v. Federal Maritime Bd., 291 F. 2d 336, 339 (1961), the court sum-

marized this authority as follows:

"[W]hen a conference has engaged in conduct violative of the fair and reasonable standards of the Act the Board may withdraw approval of the basic agreement itself, or require its modification."

Therefore, the Commission has the power to take the action contemplated by the order to show cause that instituted this proceeding; that is, the Commission may modify the Far East Conference agreement to eliminate Searsport from the authorized trading range of the conference.

Since we may take this action, we obviously may take lesser action; we may declare the newsprint rate at Searsport "open." Rather than modify the basic agreement, we believe it will be more expedient to alter the rate structure developed under the basic agreement. This will leave conference jurisdiction intact at Searsport, but it will require carriers serving that port to set rates individually on newsprint moving to Manila. Since the conference serves many destinations in addition to Manila, we believe it desirable not to curtail the scope of the agreement in any other respect. We resort to individual rate fixing because collective action has proven to be discriminatory. This order is authorized by section 15 and section 22.6

We reaffirm the view of our predecessors that we may act under section 15 not merely against the terms of section 15 agreements but against rates fixed in concert as well. In Edmond Weil v. Italian Line "Italia", 1 U.S.S.B.B. 395, 398 (1935), our predecessor stated:

[11]

"An unreasonably high rate is clearly detrimental to the commerce of the United States, and upon a showing that a conference rate in foreign commerce is unreasonably high the Department will require its reduction to a proper level. If necessary, approval of the conference agreement will be withdrawn."

While not necessary to the ultimate decision, this dictum is a proper statement of Commission authority.

In Pacific Coast—River Plate Brazil Rates, 2 U.S.M.C.

⁶ Section 22 provides:

[&]quot;The [Commission], upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this Act."

28, 30 (1938), this position was reaffirmed. There the conference allowed commodity rates on lumber to expire and thereafter, because of the failure of the conference to agree, the "cargo, not otherwise specified" rate was applied. The Commission, citing Edmond Weil, found this rate to be an unreasonably high rate detrimental to the commerce of the United States. Thereafter, the conference agreed on the lumber rate, and the Commission stated that "[u]nder the circumstances there now is no reason for withdrawing approval of Conference Agreement No. 200."

Again, in Cargo to Adriatic, Black Sea, and Levant Ports, 2 U.S.M.C. 342, 347 (1940), the Commission considered the activity of a conference in quoting rates at a fixed percentage below nonconference competition. The Commission held:

"A rate may be so low as to be unreasonable, and as one of the purposes of the conference agreement is the establishment of reasonable rates, this reduction is a violation of the agreement and constitutes a condition unfavorable to shipping in the foreign trade. Inasmuch as the conference has restored the rate to 60 cents no order with respect thereto will be entered."

These cases stand for the proposition that the Commission may either cancel or modify the agreement or act against the offending rate itself. Indeed, as the Supreme Court said in *California* v. *United States*, 320 U.S. 577, 582 (1944):

"Having found violations of §§ 16 and 17, the Commission was charged by law with the duty of devising appropriate means for their correction."

Once before the Commission considered a problem where individual carriers, operating pursuant to a conference tariff, violated section 17. In Nickey Bros. v. Manila Conference, 5 F.M.B. 467 (1958) the Commission's predecessor noted that while some of the conference members were not violating the statute because they did not operate in the particular trade [12] in question, they were members of the conference and since the conference was ordered to establish rate parity, the order was directed to all conference members whether they served the trade (or violated the Shipping Act) or not. Our order in this case follows the rationale in Nickey; it is a practical means of eliminating the discrimination.

Thus, the Commission has the power to act against conference rates. We will, therefore, remove the artifical barrier imposed by the conference, which created the discriminatory situation, by opening the conference rate at Searsport on newsprint moving to Manila. This will remove the excuse that carriers cannot establish rates on a non-discriminatory basis at Searsport. Upon opening the rate carriers may set rates freely. We will be alert to ascertain whether these independent rates are non-dis-

criminatory.

The conference argues that section 15 cannot confer the authority to remove Searsport from the range of the conference. The argument is premised upon the contention that section 15 makes approval of agreements mandatory unless they are found to operate in a manner proscribed by section 15. The conference contends that there is absolutely no showing (rather the Commission's own findings in Docket No. 1155 are to the contrary), that the conference has violated section 15 in any respect. In other words, the conference argues that the only legiti-

mate inquiry would be for the Commission to show cause why the agreement should not enjoy continued approval.

The argument, however, ignores that fact that the Commission earlier found unjust discrimination against the port of Searsport and shippers using that port, and that the finding of unjust discrimination was based on substantial evidence. Since the condition which permits the continuation of this discrimination lies with the conference, there is a sufficient foundation to find that conference action should be modified by the Commission to alleviate the unlawful conduct.

The conference argues that as a matter of law the conference cannot be held to discriminate against Searsport by reason of Canadian rates. This argument is based upon a contention that the Commission's proposed remedy in this proceeding—to eliminate Searsport from the range of the conference— [13] can be made only if the Commission finds that the conference itself violated section 17 by treating competitive exporters and competitive ports differently. And, of course, the conference claims that this finding cannot be made on this record.

The argument runs this way: no finding of discrimination can be made unless the same person (or conference) serves both the preferred and the prejudiced port; the conference does not control rates from Canadian ports; therefore, the conference did not discriminate; citing Texas & Pacific Ry. Co. v. United States, 289 U.S. 627 (1933). While we have not heretofore relied upon a hold-

⁷ The Texas & Pacific principle has been construed to apply only where the Interstate Commerce Commission is directing the carriers to remove the discrimination where the order requires the carriers to do something they are powerless to perform. In

ing that the conference has violated section 17, we have relied upon the equivalent language in section 15.

The impact of this argument in the instant case would be curious indeed. First of all we could not find a violation of section 17 by the conference since it, as a conference, does not control rates from St. John. Secondly, we could not under section 15 scrutinize the conference's conduct to determine whether there is discrimination between ports or between United States and foreign exporters. This is too restrictive. The Commission is not powerless to act against a situation which has a harmful impact on our commerce, one of our ports, and on one of our exporters simply because the trading range of the Far East Conference does not include Canada. Section 17 does not explicitly contain a requirement that a finding thereunder be made only against a carrier which prefers one port or exporter and prejudices another port or exporter by serving both. Certainly in this context such a holding would effectively frustrate the purposes of section 17. There is discrimination because [14] shipments from Searsport pay a surcharge and shipments from St. John do not. So long as there cannot be parity between the two ports, the discrimination will continue. Consequently, since the conference does not have control over Canadian rates and, therefore, cannot establish parity of rates, we

New York v. United States, 331 U.S. 284, 342 (1947) the court commented as follows:

[&]quot;If the hands of the [Interstate Commerce] Commission are tied and it is powerless to protect regions and territories from discrimination unless all rates involved in the rate relationship are controlled by the same carriers, then the 1940 amendment to § 3(1) fell far short of its goal. We do not believe Congress left the Commission so impotent."

The statutory provision alluded to is similar to Shipping Act provisions; therefore, we follow this principle.

will suspend their control over the newsprint rate at Searsport. Since the conference does not control rates both from Searsport and St. John, we will not let them control either. Then carriers who do serve both ports can

equalize the rates.

The conference argues that this proceeding is procedurally defective because it denies the opportunity for cross-examination which is guaranteed by the Administrative Procedure Act. It also claims that the order fails to give them appropriate notice of the matters of fact and law to be asserted, and that this proceeding is improper because it was "conceived in vindictiveness and dedicated to harassment." However, the APA does not require a full evidentiary hearing with full opportunity for cross-examination. The right of cross-examination should be granted where it is necessary for full disclosure of facts. Where it is not necessary, then the opportunity for cross-examination is not afforded as a matter of right.

The argument of the conference shows this as section

7(c) merely states:

"... Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

The obvious qualification is that a party is entitled to cross-examination only where it is necessary for full disclosure of the facts. Furthermore, the "hearing" to which respondent is entitled does not necessarily mean a full evidentiary proceeding. "Hearing" is defined to be "any oral proceeding before a tribunal." It may be by trial or argument. Davis, Administrative Law Treatise, Section 7.01, p. 407.

[15]

Respondent is, of course, entitled to a fair hearing. But that concept means only that the party must have an opportunity to meet such facts which adversely affect its interests.

A leading authority on administrative law has discussed this problem at some length and concluded:

"The cardinal principle of fair hearing is neither that all facts used should be in the record unless they are indispuable, nor that all facts used should be subject to cross-examination and rebuttal evidence, nor that 'nothing can be treated as evidence which is not introduced as such,' but it is that parties should have opportunity to meet in the appropriate fashion all facts that influence the disposition of the case." Davis, Administrative Law Treatise, Section 15.14, p. 432.

It is well recognized in administrative law that cross-examination is unnecessary where no issue of fact is raised and the party has full opportunity to be heard on the issue of law.

Thus, the Commission finds that the conference has been given an opportunity to meet the facts which adversely affected its interests. And, with respect to the findings made in Docket No. 1155, these facts speak for themselves and may be used by the Commission. There is no further need for cross-examination, since the conference was earlier provided an opportunity to contest such facts before the Commission.

While the APA requires notice in administrative proceedings, this requirement is flexible and is met if the notice amounts to a general summary of the matters in issue. Here, it is evident that respondents have been

given adequate notice, since the conference has been aware of the problem since its inception and since the Commission's order to show cause contains a summary of the

development of the problem.8

In Cella v. United States, 208 F. 2d 783 (1953), the court held that in an administrative proceeding, it is only necessary that the one proceeded against be reasonably apprised of the issues in controversy, [16] and any such notice is adequate in the absence of a showing that a party was misled. As this Commission itself has stated in a previous case, all that is required in a pleading instituting an agency action is a statement of the things claimed to constitute the offense charged so that respondent may put on his defense. Pacific Coast European Conference—Limitation on Membership, 5 F.M.B. 39, 42 (1956).

With respect to this argument, the Commission holds that the conference has been given sufficient notice of the matters involved so that it could prepare its own position.

With respect to the harassment and vindictiveness of the proceeding, the accusations are unjustified, since the origin of the proceeding results from refusal of the conference to allow Maersk to comply with a Commission order. The Commission is simply, and in accord with its duty, trying to alleviate a patently discriminatory situation.

The conference also contends that the proceeding is procedurally defective because the order to show cause imposes upon it the burden to establish the facts. We reject this contention. No matter what may be the state of the law with respect to burden of proof in this proceed-

⁸ See "Review of Dual-Rate Legislation 1961-1964." 88th Cong. 2d Sess., where the subject was discussed at 418-21 and 607-09 before the House of Representatives Merchant Marine and Fisheries Committee, Special subcommittee on Merchant Marine.

ing, one fact remains: The Commission in its earlier decision made a finding of unjust discrimination and it now has evidence before it that the conference has prohibited Maersk from complying with the order. In effect, the Commission has fulfilled its burden since we rely upon these indisputable facts. Thus, it is not now so much a question of burden of proof as a question of whether the facts already before the Commission have any legal effect. Furthermore, our decision rests upon the record, not on the basis of whether one side or the other has met its burden of proof.

ULTIMATE CONCLUSION

The Far East Conference agreement and the conference tariff, by requiring the assessment of a surcharge at Searsport, Maine, on newsprint moving to Manila, Republic of the Philippines, has operated in a manner which is unjustly discriminatory and unfair as between ports and between exporters from the United States and their foreign competitors, detrimental to the commerce of the United States, and contrary to the public interest contrary to the requirements of section 15 of the Shipping Act, 1916. [17] We will order the conference to open the rates on newsprint at Searsport, and we will order carriers serving that port to file and observe non-discriminatory rates.

An appropriate order will be entered.

Commissioner Hearn dissenting:

The majority in ordering the rates on newsprint "open" at Searsport, Maine only, in an effort to put that commodity at that port on a parity with the rates from the Port of St. John, New Brunswick I fear, have missed the

mark. Respondent conference's surcharge in this trade has been approved by our decision in Docket 1155. That case established the fact that the surcharge is justified and is a legitimate expense because of port conditions in Manila over which the carriers have no control. As a matter of principle, all cargo lifted to Manila should bear equally its fair share of the increased costs attendant on

calls at that port.

In Imposition of Surcharge on Cargo to Manila, Docket Number 1155, the Commission found that one of the conference members, Maersk Line, in addition to serving the newsprint trade at Searsport under the aegis of the conference, also lifted newsprint from the Canadian port of St. John, a port not within the scope of the conference's jurisdiction. Maersk did not assess a surcharge against newsprint from the Canadian port and we found that its action constituted an unlawful [18] discrimination against newsprint emanating from Searsport. To obviate that unlawfulness we ordered Maersk to cease and desist from assessing the surcharge on newsprint out of Searsport. Subsequently, Maersk abandoned its Searsport service.

While Maersk did not strictly comply with our earlier order neither did it violate that order since it abandoned the Searsport trade. In effect it avoided our earlier order. Currently Searsport is being well served by other members of the conference who have a voice in setting conference rates at Searsport and who wish to assess the Commission approved surcharge, based upon the earlier carefully deliberated decision, which in my opinion they have a right to do. Consequently, since the conference does not serve St. John it has not engaged in discriminatory practices and has not violated the shipping statutes. Further, it is apparent that, in spite of long work stoppages this year, five conference carriers have furnished

Searsport with eight sailings through August; the State Port Authority Representative at oral argument, advised us that the current conference service is adequate; and most importantly that since our order in Docket Number 1155 no newsprint has been diverted from Searsport to St. John.

The proceeding now before us was instituted, in light of the foregoing, to determine whether or not Searsport should be stricken from the trading range of the conference. I am convinced that Searsport does not want this result and there is no basis on this record for such drastic action. Nor do I believe that the less drastic action ordered by the majority here, i.e., [19] opening of the newsprint rate at Searsport, is supported by the record. The plain facts are that we have already determined that the existence and the level of respondent's surcharge is lawful, and that the conference vessels who offer newsprint service and levy the surcharge at Searsport do not now offer the same services at lower rates at St. John.

The majority action here gives rise to grave questions respecting the legality of surcharges assessed:

- (1) against other commodities by conference vessels throughout their service range; and
- (2) against newsprint which may be offered by shippers at other ports within the conference range.

The majority action here is official Commission approval of a discrimination against shippers of newsprint from any other port and of an undue tariff burden against shippers of all commodities from all ports within the conference range.

Finally, the ordering of the newsprint rate "open" may be completely illusory in so far as the level of the surcharge is concerned because the carrier's cost of doing

business must be considered in setting a rate, even an "open" rate, and the cost of doing business in Manila involves elements not found at other ports. Consequently, the ordering of an "open" rate on newsprint may well leave the rates at the same level as they are today.

[20]

In my opinion no action lies against the Conference since it has conducted its activities within the letter of the law, if not within its spirit. *Practices of Fabre Line and Gulf/Mediterranean Conf.*, 4 F.M.B. 611 (1955).

Therefore, I would discontinue this proceeding.

Commissioner John S. Patterson, dissenting:

I dissent from the results reached in the majority report in this proceeding, and, for reasons advanced by Commissioner George H. Hearn, I am in accord with his dissenting opinion.

My additional reasons for dissenting are:

1. The Commission has no authority to order the Far East Conference to revise rates nor to "withdraw their authority to set this rate" in response to an order of investigation to show cause why Federal Maritime Commission Agreement No. 17 should not be amended to remove the Port of Searsport from the trading range of the Conference. Such an order reaches a decision not responsive to the order initiating the adjudication.

2. Alleged bad conduct does not confer authority to revise rates. If past and present conduct of the carriers is thought to be unlawful, acts must be proven in an adjudication pursuant to the Administrative Procedure Act and related to the Shipping Act, 1916. If the Far East Conference Agreement operates to the detriment of the

commerce of the United States, the terms which guide the carriers' conduct have to be specified, and we must show in a hearing what has been done and how the detriment occurs. This has not been done.

Thomas Lisi Thomas Lisi Secretary

Order of Federal Maritime Commission, Served November 5, 1965

[1]

Served November 5, 1965 Federal Maritime Commission

[SAME TITLE]

ORDER

The Commission instituted Docket No. 65-29 pursuant to sections 15 and 22 of the Shipping Act, 1916, upon Order directed to respondent Far East Conference to show cause why Agreement No. 17 should not be amended to remove the Port of Searsport from the trading range of the conference, because the applicable tariffs of the conference result in a situation which is detrimental to the commerce of the United States, contrary to the public interest, and otherwise in violation of the Shipping Act (section 17, first paragraph). The Commission has this date entered its Report stating its findings and conclusions, which Report is made a part hereof by reference, and the Com-

Order of Federal Maritime Commission, Served November 5, 1965

mission has found that Agreement No. 17 of the Far East Conference has operated in a manner which is unjustly discriminatory and unfair as between ports and between exporters from the United States and their foreign competitors, detrimental to the commerce of the United States, and contrary to the public interest.

THEREFORE, IT IS ORDERED, That the Far East Conference on or before November 22, 1965, open the rate on newsprint at Searsport, Maine, on shipments to Manila, Republic of the Philippines. Carriers wishing to file tariffs to carry newsprint from Searsport to Manila shall file an appropriate tariff to become effective on the same date that the conference rate becomes "open"; otherwise, individual initial tariffs must [2] be filed on 30 days' notice. If the rate is not opened as ordered above within the time specified, Searsport shall be deleted from the authorized trading range of the Conference.

By the Commission.

Thomas Lisi Thomas Lisi Secretary

(SEAL)

[1]

IN THE

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit
Case No. 19,790

Far East Conference: American President Lines, Ltd.; Skibsaktieselskabet Varild, Aksjeselskapet Marina, Glittre, Aktieselskabet Dampskibsinteressentskabet Garonne, Aktieselskabet Standard, Fearnley & Egers Befragtningsforretning A/S, Skibsaktieselskapet Sangstad. Skibsaktieselskapet Solstad, Skibsaktieselskapet Siljestad, Dampskibsaktieselskabet International, Skibsaktieselskapet Mandeville, Skibsaktieselskapet Goodwill, and Universal Trading & Shipping Agency Aksjeselskap: Isthmian Lines, Inc.; Japan Line, Ltd.; Kawasaki Kisen Kaisha, Ltd.; Lykes Bros. Steamship Co., Inc.; Maritime Company of the Philippines, Inc.; Mitsui O.S.K. Lines, Ltd.; Dampskibsselskabet Af 1912 Aktieselskab and Aktieselskabet Dampskibsselskabet Svendborg; Nippon Yusen Kaisha; States Marine Lines, Inc. and Global Bulk Transport Incorporated; United Philippine Lines, Inc.; United States Lines Company; Wilhelmsens Dampskibsaktieselskab, A/S Den Norske Afrika-Og Australielinie, A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S Tankfart V, A/S Tankfart VI; and Yamashita-Shinnihon Steamship Co., Ltd.,

Petitioners.

⊽.

Federal Maritime Commission and United States of America

Respondents.

[2]

The Petition of the Far East Conference and the above-named common carriers by water, members thereof, respectfully shows:

- 1. This petition is filed and the jurisdiction of this Court is invoked pursuant to §§2 and 4 of the Judicial Review Act (Federal Agencies), 64 Stat. 1129, as amended, 1130 (5 U.S.C. §§1032, 1034), to enjoin, set aside, and determine to be invalid a final order of the Federal Maritime Commission served on November 5th, 1965, in FMC Docket No. 65-29—Imposition of Surcharge by the Far East Conference at Searsport, Maine. A copy of said order is annexed hereto, marked Exhibit A. A copy of the report of the Commission in its Docket No. 65-29 and of the dissenting reports of Commissioners Hearn and Patterson, also served on November 5th, 1965, is annexed hereto, marked Exhibit B.
- 2. (a) The petitioner, Far East Conference (hereinafter, "FEC"), is a rate-making Conference of common carriers by water, established pursuant to Federal Maritime Commission Agreement No. 17, duly approved pursuant to §15 of the Shipping Act, 1916, 39 Stat. 733, as amended (46 U.S.C. §814), and amendments thereof from time to time duly approved pursuant to said §15. FEC establishes the rates which its member common carriers quote, charge, and collect for transportation by water from ports on the Atlantic and Gulf Coasts of the United States of America to [3] ports in various Far Eastern destinations, including Manila and other ports in the Republic of the Philippines.
- (b) The member common carriers of FEC are corporations organized pursuant to the laws of various nations

and conducting, in some cases by themselves and in other cases by agreements among two or more thereof, duly approved pursuant to §15 of the Shipping Act, common carrier transportation service as parties to the FEC Agreement and members of FEC (hereinafter, the "Member Lines").

- (c) The venue of this proceeding is properly before this Court pursuant to §3 of the Judicial Review Act (Federal Agencies), 64 Stat. 1130 (5 U.S.C. §1033).
- 3. On October 23rd, 1963, the Federal Maritime Commission (hereinafter, the "Commission") instituted a proceeding designated FMC Docket No. 1155—Imposition of Surcharge on Cargo to Manila, Republic of the Philippines. Hearings were held and, following argument on exceptions to an examiner's initial decision, the Commission, on February 3rd, 1965, served its report. In said report, the Commission concluded as follows:
 - "1. Respondents are justified in imposing a surcharge on cargo unloaded at the Port of Manila because of the extraordinary delay occasioned by labor difficulties and port congestion.
 - "2. Respondents' surcharges, except as noted below, reasonably approximate the additional cost of serving the Port of Manila and are, therefore, not in violation of sections 15, 16, 17 and 18(b)(5) of the Shipping Act, 1916.
 - "3. Respondents' surcharges, imposed on a fixed-dollar per-ton basis or on a percentage of the freight [4] rate basis, are not unjust or unreasonable in violation of sections 16, First or 17 of the Shipping Act, 1916.

"4. Respondents, Maersk Line and Pacific Star Line, by imposing a surcharge on newsprint at Searsport, Maine, while they do not apply a surcharge at St. John, New Brunswick, Canada, have demanded, charged, and collected a charge which is unjustly discriminatory between shippers and ports and unjustly prejudicial to exporters of the United States as compared with their foreign competitors contrary to section 17 of the Shipping Act, 1916.

"An appropriate order will be issued."

- 4. By an order, dated June 23rd, 1965, of Judge Inzer B. Wyatt, of the United States District Court for the Southern District of New York, the Commission caused to be instituted in said court a proceeding, entitled Federal Maritime Commission, Petitioner v. Maersk Line, Respondent, Misc. No. 18-304, for the enforcement against Maersk Line pursuant to §29 of the Shipping Act, 1916, 39 Stat. 737 (46 U.S.C. §828), to enforce obedience by Maersk Line to the Commission's order in the aforesaid Docket No. 1155. By order dated July 28th, 1965, said court denied the Commission's application for an injunction on the ground that Maersk Line had not violated the Commission's order and that such violation is a prerequisite for an enforcement proceeding under §29 of the Shipping Act.
- 5. The Commission's Docket No. 65-29 was instituted by an order to show cause served upon FEC and its Member Lines on August 11th, 1965. Said order recited the Commission's proceedings in its Docket No. 1155, the

Commission's unsuccessful enforcement suit against Maersk Line, and the fact that Maersk [5] Line had, on three occasions "petitioned" FEC to eliminate the "Searsport surcharge in order to allow Maersk to comply with the order [in Docket No. 1155], and was not permitted by the Conference to make the change," and that, therefore, Maersk Line could not comply with the order. The order to show cause directed FEC, pursuant to §§15 and 22 of the Shipping Act, 39 Stat. 733, as amended, 736 (46 U.S.C. §§814, 821), to show cause why its Agreement No. 17 should not be amended to remove the port of Searsport from the trading range of the Conference. The order further provided that the proceeding should be limited to the submission of affidavits and memoranda, replies thereto, and oral argument. The closing date for the filing of the affidavits and memoranda on behalf of FEC was fixed at August 23rd, 1965. Although duly protesting the inadequacy of its opportunity to present its case, FEC, by its attorney, complied to the best of its ability with the requirements of the order to show cause.

- 6. The Commission's final order in FMC Docket No. 65-29 of which review is here sought (Exh. A annexed, hereinafter, the "Order"), is unlawful and invalid because:
 - (a) It requires FEC to open a rate, a requirement which is beyond the Commission's power, and it purports to enforce that requirement by the threat of a sanction, i.e., the deletion of the port of Searsport, Maine, from the scope of the FEC approved Agreement without the making of the findings required by §15 of the Shipping Act, 1916, as amended, on the basis of the [6] full hearing re-

quired by §23 of the Shipping Act, 1916, 39 Stat. 736, as amended (46 U.S.C. §822), and §7(c) of the Administrative Procedure Act, 60 Stat. 241 (5 U.S.C. §1006(c));

- (b) Action taken in the Order is not the action proposed in the Order to Show Cause which initiated the administrative proceeding and, accordingly, petitioners have not had the notice and opportunity to oppose said action contemplated by §5(a) of the Administrative Procedure Act, 60 Stat. 239 (5 U.S.C. §1004(a)), and by Amendment V to the Constitution of the United States;
- (c) The Order assumes as a fact that Maersk Line is violating the Commission's order in Docket No. 1155 and is doing so as the direct result of FEC action, whereas in fact, Maersk Line is not violating the Commission's order in Docket No. 1155 and it has been so held by the United States District Court for the Southern District of New York;
- (d) The Order proceeds on the theory that FEC is discriminating between shipments to Manila from Searsport, Maine, and shipments to Manila from St. John, New Brunswick, whereas in fact, FEC establishes no rates from St. John to any destination and is not authorized so to do, and exercises no power or control over the rates which any of its Member Lines may charge from St. John, New [7] Brunswick, to any destination;
- (e) The Order is predicated on the theory that FEC is precluding Maersk Line from carrying newsprint from Searsport to Manila, whereas in fact, FEC

neither has nor exercises any control over the itinerary and service offered and rendered by Maersk Line or any other Member Line, and Maersk Line may avoid violation of the Commission's order in Docket No. 1155 in several ways in addition to the discontinuance of service from Searsport to Manila;

- (f) Compliance with the Order would probably subject the Member Lines to the charge of unjustly discriminating against shippers of newsprint from Atlantic and Gulf ports other than Searsport to Manila, and of subjecting such other ports to undue prejudice and disadvantage; and
- (g) The Order, in effect, constitutes a reversal of the Commission's decision in its Docket No. 1155 without appropriate notice and without a reopening of said proceeding, and without the opportunity for FEC and the Member Lines to adduce evidence and to cross-examine witnesses adverse to them.

WHEREFORE, petitioner prays that this Honorable Court make and enter an order:

1. Declaring the Order to be invalid;

[8]

- 2. Setting aside and enjoining the enforcement of the Order;
- 3. Granting a temporary stay or suspension of the enforcement of the Order and an interlocutory injunction suspending or restraining the same pending the final hearing and determination of this petition; and

4. Granting to petitioner such other and further relief as to this Court may seem just and proper in the premises.

Respectfully submitted,

New York, N.Y. November 17th, 1965.

ELKAN TURK, JR.
Attorney for the Far East
Conference and the Member Lines,
Burlingham Underwood
Barron Wright & White
26 Broadway
New York, N.Y. 10004

[EXHIBITS OMITTED.]

Affidavit of Raymond J. Flynn, Sworn to November 17, 1965, in Support of Application for Interlocutory Injunction and for Temporary Stay Pending Hearing on and Determination of Such Application

[1]

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 19790

[SAME TITLE]

State of New York, County of New York—ss.:

RAYMOND J. FLYNN, first being duly sworn, deposes and says.

1. I am the Secretary of the Far East Conference (hereinafter, the "FEC"), an agreement among common carriers by water in United States foreign commerce establishing the rates which the parties to the agreement will charge in the trade from United States Atlantic and Gulf ports to various destinations in the Far East, including Manila and other ports in the Republic of the Philippines. The FEC agreement and numerous amendments thereto have all been duly approved pursuant to \$15 of the Ship- [2] ping Act, 1916, as amended, and designated FMC Agreement No. 17. I am making this affidavit in support of the application herein of the FEC and the parties to the FEC Agreement for a stay and an interlocutory injunction restraining enforcement of an order of the Federal Maritime Commission in its Docket No. 65-29,

Affidavit of Raymond J. Flynn, Sworn to November 17, 1965, in Support of Application for Interlocutory Injunction and for Temporary Stay Pending Hearing on and Determination of Such Application

directing FEC to open its rate on newsprint from Searsport, Maine, to Manila, Republic of the Philippines, on or before November 22nd, 1965, failing which the Commission will delete Searsport from the range of ports at which FEC is authorized by its Agreement to establish the rates to be charged by its members.

- 2. The common carriers, parties to the FEC Agreement (hereinafter, the "Member Lines"), include lines flying the flags of the United States, Japan, Norway, Denmark and the Republic of the Philippines. By reason of their membership in FEC, the Member lines charge uniform rates from all United States Atlantic and Gulf ports to various groupings of Far Eastern ports.
- 3. If FEC complies with the Commission's order and opens its rate on newsprint from Searsport, Maine, to Manila, those Member Lines who serve Searsport will no longer be bound by an agreed tariff rate, and will be compelled to engage in rate competition. Normally, it would be expected that their rates would then be lower than the previously agreed rate, with the results:
- (a) That the lines carrying newsprint from Searsport to Manila will lose revenue which can never be recovered, even if the Commission's order is held to be invalid and set aside; and

[3]

(b) That those lines will subject themselves to charges that they are unjustly discriminating in favor of a newsprint shipper at Searsport and against newsprint shippers who use other ports covered by the FEC tariff, and that Affidavit of Raymond J. Flynn, Sworn to November 17, 1965, in Support of Application for Interlocutory Injunction and for Temporary Stay Pending Hearing on and Determination of Such Application

they are granting to Searsport an undue preference and advantage over ports covered by the FEC tariff.

- 4. If FEC does not comply with the Commission's order and the Commission orders the FEC Agreement amended by deleting therefrom Searsport as a port from which FEC is authorized to establish rates to the Far East, the same consequences will follow as are set forth in paragraph 3 above, except that those consequences will apply not only to newsprint, but to all other tariff items which are moving or are susceptible of being moved through the port of Searsport to all destinations in the Far East.
- 5. If, as a result either of the opening of the newsprint rate from Searsport to Manila or of the deletion of Searsport from the FEC Agreement, open competition among the Member Lines drives rates on cargo from Searsport to Manila to such a low level that it ceases to be commercially feasible for the Member Lines to divert their vessels to call at Searsport, the port of Searsport and any shippers who use that port will be deprived of the service which they have been enjoying.

RAYMOND J. FLYNN Raymond J. Flynn

Sworn to before me this 17th day of November, 1965

ELKAN TURK, JR. Elkan Turk, Jr.

Notary Public, State of New York
No. 60-9395950 Qual. in Westchester Co.
Cert. filed in New York County
Commission Expires March 30, 1966

Order of United States Court of Appeals for the District of Columbia Circuit, Filed November 19, 1965, Denying Motion for Temporary Stay of Order Under Review

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,790

September Term, 1965

[SAME TITLE]

Before: FAHY, DANAHER, and BURGER, Circuit Judges,

ORDER

This case came on for hearing on petitioners' motion for temporary stay of the order of the Commission on review herein, and said motion was argued by counsel.

Upon consideration whereof, it is

Ordered by the court that the aforesaid motion is denied.

Per Curiam.

Circuit Judge Danaher would grant the stay.

UNITED STATES COURT OF APPEALS for the District of Columbia Circuit

FILED Nov 19 1965

NATHAN J. PAULSON Clerk

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,790

[SAME TITLE]

I. THE ISSUES AS STATED BY THE PETITIONERS.

The Federal Maritime Commission (FMC) order under review directed the Far East Conference (FEC) to open its rate on newsprint from Searsport, Maine, to Manila, Republic of the Philippines, on or before November 22nd, 1965, and stated that, absent compliance with the order, the port of Searsport would be deleted from the authorized trading range of FEC, which establishes rates to be charged by its member steamship lines for transportation of property from United States Atlantic and Gulf ports to numerous destinations in the Far East, including Manila. The report of the FMC, upon which the order under review was predicated, held that the FEC Agreement and tariff, by requiring its members to assess a surcharge on newsprint moving from Searsport to Manila, had operated in a manner which was unjustly [2] discriminatory and unfair as between ports and as between exporters from the United States and their foreign competitors, and detrimental to United States commerce, and contrary to the public interest. This holding, in turn, was based on the asserted failure of one member of FEC, Maersk Line, to comply with the FMC's order in an earlier proceeding, FMC Docket No. 1155, and the as-

serted action of FEC in preventing Maersk Line from

complying with the order in Docket No. 1155.

In Docket No. 1155, in a report served on February 3rd, 1965, the FMC held that the FEC surcharge on cargo to Manila from all United States Atlantic and Gulf ports did not violate §§ 15, 16, 17 or 18(b)(5) of the Shipping Act, 1916, as amended. It did hold that Maersk Line, which theretofore had served Manila both from United States Atlantic ports and from St. John, New Brunswick, Canada, and which had applied the surcharge from United States Atlantic ports, including Searsport, Maine, but had not applied a surcharge on newsprint from St. John, had demanded, charged and collected a charge which was unjustly discriminatory between shippers and ports, and unjustly prejudicial to exporters of the United States as compared with their foreign competitors, contrary to §17 of the Shipping Act, 1916.

Having found no violation by FEC, the Commission, in its order in Docket No. 1155, directed no action to be taken by FEC. In did direct Maersk Line to cease and desist from assessing on newsprint from Searsport to Manila a surcharge which [3] is prejudicial and discriminatory to exporters of newsprint from the United

States and to the port of Searsport.

Maersk Line complied with the order in Docket No. 1155 by discontinuing the carriage of newsprint from Searsport to Manila. Nevertheless, the FMC instituted an enforcement proceeding against Maersk Line, Federal Maritime Commission v. Maersk Line (S.D.N.Y. Misc. No. 18-304). By its order of July 28th, 1965, the District Court dismissed the enforcement proceeding on the ground that a showing of violation of the Commission's order was prerequisite, and that Maersk Line had not violated the Commission's order.

Thereupon, the FMC instituted its Docket No. 65-29—Imposition of Surcharge by the Far East Conference at Searsport Maine—by an order to show cause served on August 11th, 1965. The order directed FEC and its members to show cause why the FEC Conference Agreement should not be amended to remove the port of Searsport from the trading range of the Conference. The order provided for the filing by FEC of a memorandum and affidavits on or before August 23rd, 1965, for the filing of memoranda and affidavits by the Commission's counsel and any intervenors on or before September 8th, 1965, and for oral argument on September 16th, 1965. The order made no provision for an oral hearing at which FEC might present evidence and rebuttal evidence, and at which FEC might cross-examine adverse witnesses.

On the basis of memoranda and affidavits submitted pursuant to the order to show cause and oral argument, the FMC [4] issued the order under review.

The issues presented on review are whether the Commission's order under review is invalid because:

- 1. The procedure under which it was made denied to FEC and its member lines the rights assured to them by §§5(a) and 7(c) of the Administrative Procedure Act and by Amendment V to the Constitution.
- 2. It threatens the sanction of modification of the FEC Conference Agreement pursuant to §15 of the Shipping Act, 1916, without the making of the prerequisite findings of fact based on a record compiled at a full hearing as required by §23 of the Shipping Act, 1916.
- 3. It is predicated on a holding that FEC is imposing an unjust discrimination in rates between a United States exporter and Canadian exporters and

between the port of Searsport and the port of St. John, whereas FEC does not in any way participate in or control the making of any rate from any Canadian port to Manila or elsewhere.

- 4. It is predicated on a holding that FEC is causing detriment to the commerce of the United States and is operating contrary to the public interest by causing Maersk Line not to serve the trade in newsprint from Searsport to Manila, whereas FEC neither has nor exercises any control or influence over the [5] itinerary and service of Maersk Line except as to the rates which will be charged by Maersk Line from United States Atlantic and Gulf ports to ports in the Far East.
- 5. It proceeds on the theory that FEC has preprevented Maersk Line from complying with the FMC order in Docket No. 1155, whereas in fact, Maersk Line has never violated that order.
- 6. It will, if it results in a reduction of the total charges of the individual members of FEC for the transportation of newsprint from Searsport to Manila, probably result in the charge that those members of FEC are unjustly discriminating against shippers of newsprint from Atlantic and Gulf ports other than Searsport to Manila, and are subjecting such other ports to undue prejudice and disadvantage.
- 7. It constitutes, in effect, a reversal of the decision in FMC Docket No. 1155 without appropriate notice and without a reopening of that proceeding, and without the opportunity for FEC and its member lines to adduce evidence and cross-examine witnesses adverse to them.

II. THE ISSUES AS STATED BY THE RESPONDENTS.

Respondents are in disagreement with the statement of the case as presented by the petitioners, and they therefore reserve the right to restate the case in their brief. in the [6] opinion of respondents, the questions presented are as follows:

- 1. Having found that the Far East Conference Agreement was operating in a manner which was unjustly discriminatory between ports, unjustly discriminatory and unfair as between exporters from the United States and their foreign competitors, detrimental to the commerce of the United States, and contrary to the public interest, due to the continuation of a surcharge on the carriage of newsprint from Searsport, Maine, and the refusal of the Conference to remove the surcharge, was not the Federal Maritime Commission authorized and indeed required to order the Conference to open its rate on newsprint from Searsport, or, in the alternative, order the port of Searsport deleted from the Conference range of ports?
- 2. Was not the Conference accorded a fair hearing previous to the issuance of the report and order under review, when it had already had a full opportunity to contest the facts utilized by the Commission, had had adequate notice of the Commission's order to show cause, had had an opportunity to submit further affidavits of fact and memoranda of law, and had had an opportunity for oral argument?

- III. PETITIONER'S DESIGNATION OF THE PORTIONS OF THE RECORD TO BE PRINTED.
 - 1. FMC certification of the administrative record.

[7]

- 2. Order to show cause, served August 11th, 1965.
- 3. Memorandum of the Far East Conference in response to order to show cause (omit certificate of service).
- 4. Affidavit of James A. Dennean, sworn to August 20th, 1965, in response to order to show cause, and Exhibit "A" annexed thereto.
- 5. Reply of Hearing Counsel to memorandum of respondent, Far East Conference (omit certificate of service).
- 6. Affidavit of Joseph Carena, sworn to September 3rd, 1965.
- 7. Excerpts of transcript of oral argument before the Federal Maritime Commission, September 16th, 1965:

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"	2, "	1-21	44	23,	66	1-16
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- 8. Report of the Federal Maritime Commission, served November 5th, 1965 (including dissenting opinions).
- 9. Order of the Federal Maritime Commission, served November 5th, 1965.
- 10. Petition for Review (omit exhibits which are items 8 and 9 above).
- 11. Affidavit of Raymond J. Flynn, sworn to November 17th, 1965, in support of application for interlocutory injunction and for temporary stay, etc.

- 12. Order of this Court, filed November 19th, 1965, denying motion for temporary stay of the order under review.
 - 13. This Stipulation.

The undersigned attorneys for the parties hereto have been unable to agree on a joint statement of the issues presented and the attorneys for the respondents cannot, at this time, designate such additional portions of the record as they may desire to have printed. It is agreed that the respondent, Federal Maritime Commission, will use its best endeavors to serve and file its certification of the administrative record promptly so that petitioners may, if they so choose, serve and file their brief and joint appendix in printed form in the first instance. However, it is further agreed that either party may serve and [9] file its brief in typewritten or multilithed form, or in printer's page proof, the printed briefs and joint appendix to

be served and filed after the filing of the petitioners' reply brief.

New York, N.Y. December 13th, 1965.

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Washington, D.C. December 15, 1965.

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Order of the United States Court of Appeals for the District of Columbia Circuit, Filed December 17, 1965, Granting Application for Interlocutory Injunction, Staying Effectiveness of Order Under Review

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,790

September Term, 1965

[SAME TITLE]

Before: FAHY, DANAHER, and BURGER, Circuit Judges, in Chambers.

ORDER

On consideration of petitioners' application for interlocutory injunction, and of the memorandum in opposition thereto filed by respondent Federal Maritime Commission, it is

Ordered by the court that the aforesaid application be granted, and the effectiveness of the order on review

Order of the United States Court of Appeals for the District of Columbia Circuit, Filed December 17, 1965, Granting Application for Interlocutory Injunction, Staying Effectiveness of Order Under Review

herein is stayed pending final disposition by this court of the petition for review or until further order of this court.

Per Curiam.

Circuit Judge Fahy would deny the application for Interlocutory injunction.

UNITED STATES COURT OF APPEALS for the District of Columbia Circuit

FILED DEC 17 1965

NATHAN J. PAULSON Clerk

BRIEF FOR THE PETITIONERS

IN THE

Anited States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT No. 19,790

FAR EAST CONFERENCE, et al.,

Petitioners,

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA.

Respondents.

ON PETITION POB REVIEW OF AN ORDER OF THE PEDERAL MARITIME COMMISSION

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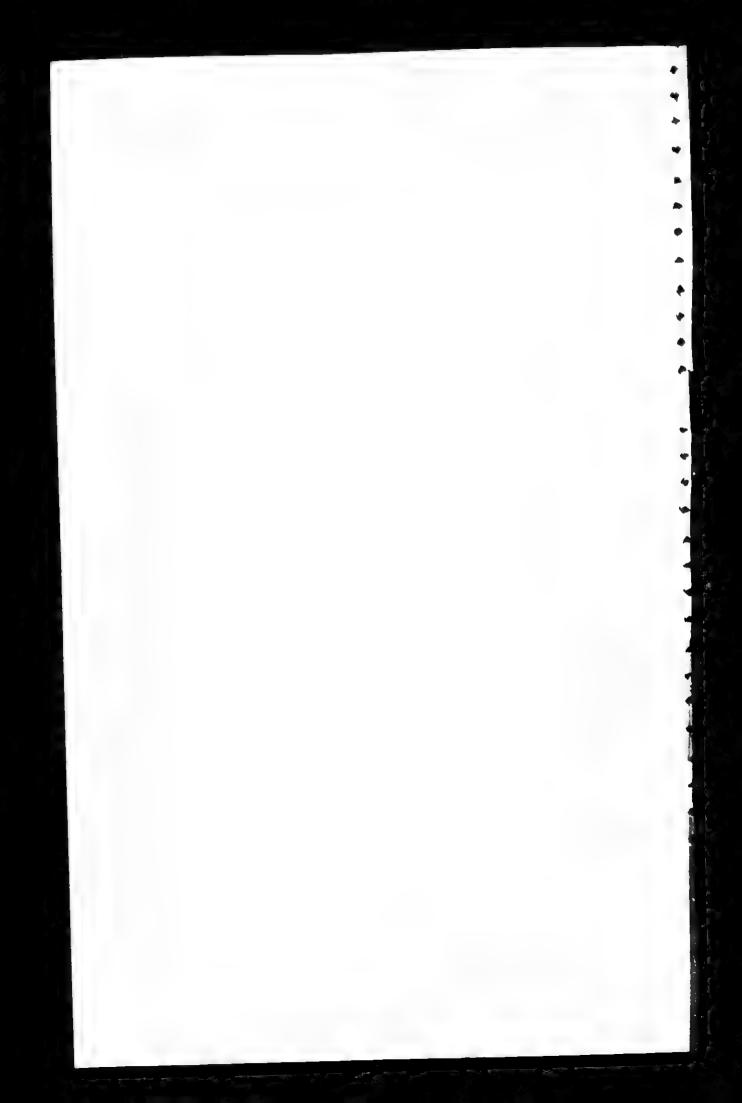
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United States Court of Appeals for the District of Columbia Circuit

FILED APR 8 1966

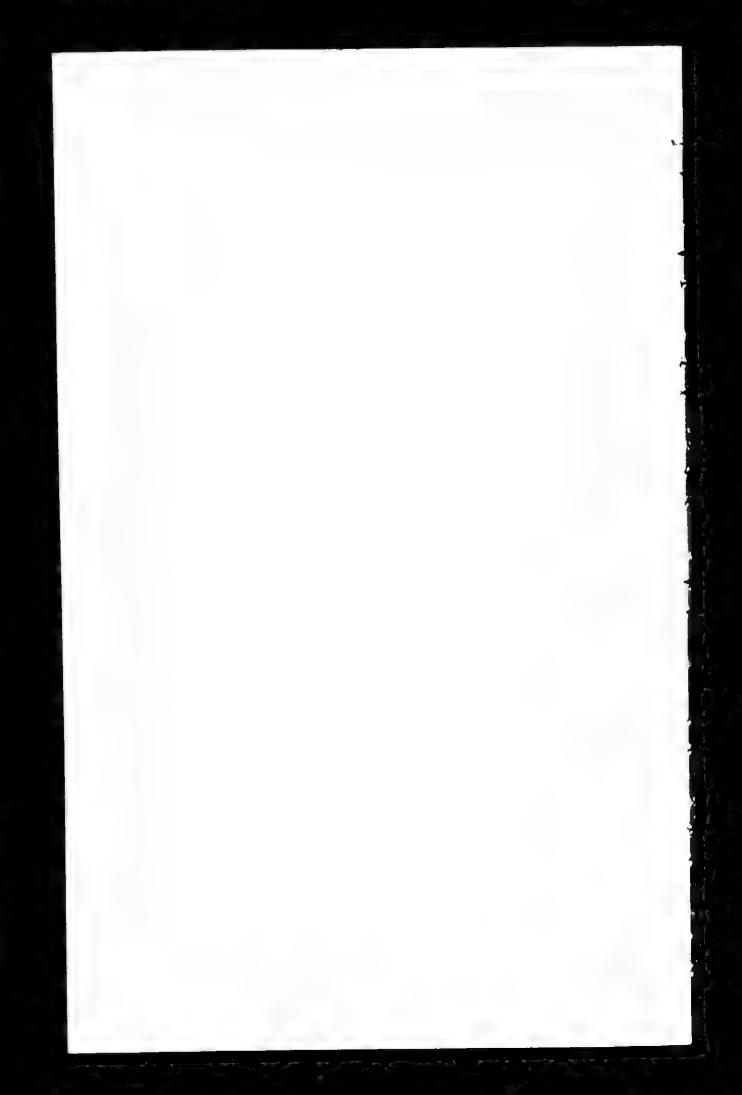
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Statement of the Questions Presented

The order under review, based on purported findings that the petitioners' Conference Agreement was unjustly discriminatory, detrimental to the commerce of the United States, and contrary to the public interest, directed petitioners to "open" their rate for newsprint from Searsport, Maine, to Manila, failing which their Agreement would be amended by deleting Searsport therefrom. The questions presented are whether that order is invalid because:

- 1. Petitioners do not jointly participate in or control the making of any rate from Canadian ports and, as a matter of law, cannot be held to have discriminated between Searsport, Maine, and any Canadian port, or shippers therefrom;
- 2. The order is based on factual premises which are untrue;
- 3. The order threatens modification of petitioners' Agreement pursuant to \$15 of the Shipping Act, without the prerequisite findings based on a full hearing required by \$23 of that Act;
- 4. The procedure on which the order was based is contrary to law, since petitioners had no notice of or opportunity to oppose the action taken by the Commission, contrary to $\S 5(a)$ of the Administrative Procedure Act; the burden of proof was imposed on petitioners contrary to $\S 7(c)$ of that Act; and petitioners were denied the opportunity to cross-examine and to adduce rebuttal evidence contrary to $\S 7(c)$ of that Act; and
- 5. Compliance with the order would probably subject petitioners to charges of unjust discrimination against shippers using United States ports other than Searsport, and against those ports.



BRIEF FOR THE PETITIONERS

IN THE

United States Court of Appeals for the district of columbia circuit

No. 19,790

FAR EAST CONFERENCE; AMERICAN PRESIDENT LINES, LTD.; SKIBSAKTIESELSKABET VARILD, AKSJESELSKAPET MARINA, AKTIESELSKABET GLITTRE, DAMPSKIBSINTERESSENTSKABET GARONNE, AKTIESELSKABET STANDARD, FEARNLEY & EGERS BEFRAGTNINGSFORRETNING A/S, SKIBSAKTIESELS-KAPET SANGSTAD, SKIBSAKTIESELSKAPET SOLSTAD, SKIBS-AKTIESELSKAPET SILJESTAD, DAMPSKIBSAKTIESELSKABET INTERNATIONAL, SKIBSAKTIESELSKAPET MANDEVILLE, SKIBSAKTIESELSKAPET GOODWILL, and UNIVERSAL TRAD-ING & SHIPPING AGENCY AKSJESELSKAP; ISTHMIAN LINES, INC.; JAPAN LINE, LTD.; KAWASAKI KISEN KAISHA, LTD.; LYKES BROS. STEAMSHIP Co., INC.; MARI-TIME COMPANY OF THE PHILIPPINES, INC.; MITUSI O.S.K. Lines, Ltd.; Dampskibsselskabet af 1912 AKTIESELSKAB and AKTIESELSKABET DAMPSKIBSSELSKA-BET SVENDBORG; NIPPON YUSEN KAISHA; STATES MARINE LINES, INC. and GLOBAL BULK TRANSPORT INCORPO-BATED; UNITED PHILIPPINE LINES, INC.; UNITED STATES LINES COMPANY; WILHELSMENS DAMPSKIBSAKTIESELS-KAB, A/S DEN NORSKE AFRIKA-OG AUSTRALIELINIE, A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S TANKFART V, A/S TANKFART VI; and YAMASHITA-SHINNIHON STEAMSHIP Co., LTD.,

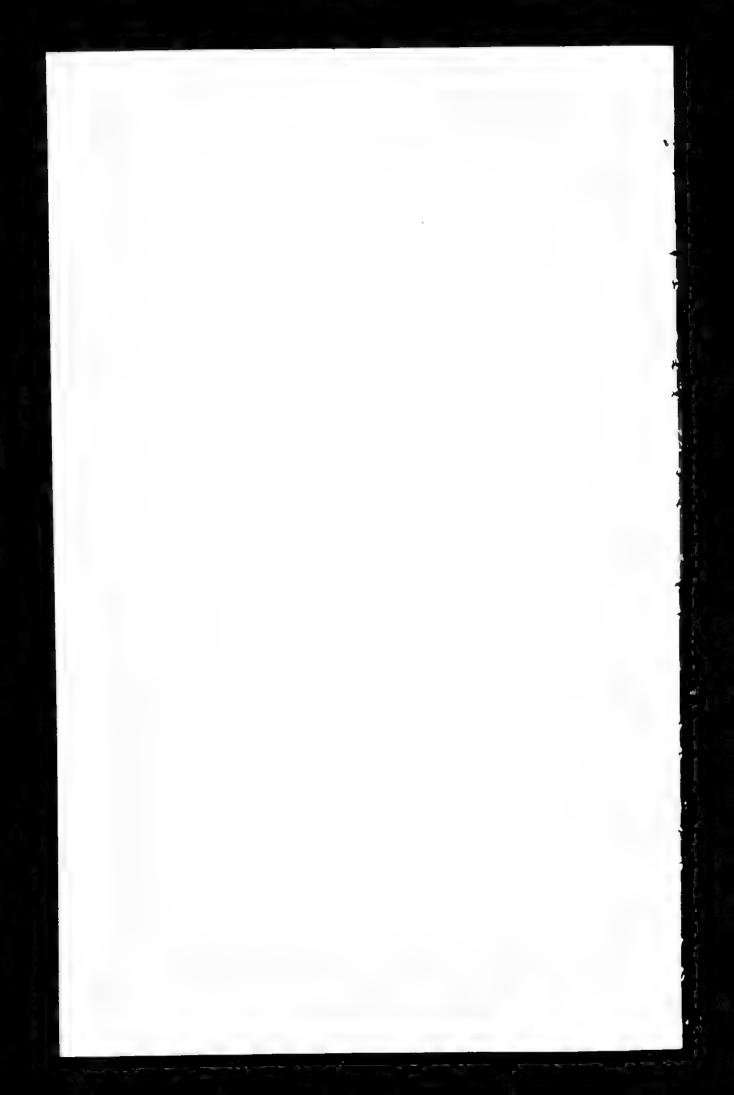
Petitioners,

-against-

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL MARITIME COMMISSION



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BRIEF FOR THE PETITIONERS

Jurisdictional Statement

The jurisdiction of this Court is invoked pursuant to §§2 and 4 of the Judicial Review Act (Federal Agencies) 64 Stat. 1129, as amended, 1130 (5 U.S.C. §§1032, 1034), to enjoin, set aside, and determine to be invalid the final order¹ of the Federal Maritime Commission in F.M.C. Docket No. 65-29—Imposition of Surcharge by the Far East Conference at Searsport, Maine. The venue of this proceeding is properly before this Court pursuant to §3 of the Judicial Review Act (Federal Agencies), 64 Stat. 1130 (5 U.S.C. §1033).

Statement of the Case

The petitioners are the Far East Conference and its member common carriers by water in the foreign commerce of the United States (sometimes hereinafter referred to as the "Conference"). The Conference is organized pursuant to F.M.C. Agreement No. 17, which, in turn, together with various amendments thereto, has been duly approved under §15 of the Shipping Act, 1916, 39 Stat. 733, as amended, 75 Stat. 763 (46 U.S.C. §814). Acting under the Agreement, the member lines establish the tariffs of rates, and rules and regulations applicable thereto, which they will charge for the transportation of cargo from Atlantic and Gulf ports of the United States to various destinations in the Far East, including Manila, Republic of the Philippines.

During 1963, the port of Manila became extremely congested because of labor strife and violence affecting the

¹ The order appears at JA 147-8, and the report of the Commission in its Docket No. 65-29, including the dissenting opinions, appears at JA 122-147.

handling of cargo discharged at that port. The Conference imposed a surcharge of \$10 per ton on all cargo transported to Manila effective October 28th, 1963. The surcharge was reduced to \$5 effective December 28th, 1963.

These facts appear in the report of the Commission in its Docket No. 1155—Imposition of Surcharge on Cargo to Manila, Republic of the Philippines, 5 Pike & Fischer SRR 788 (February 3, 1965), a proceeding instituted by the Commission on its own motion, "to determine whether the surcharges are contrary to Sections 15, 16, 17, and 18(b)(5) of the Shipping Act, 1916."² (Id. at 789; JA 2.)

The Commission held that the surcharges were justified to recoup the special costs of calling at Manila, and that the basis for their computation was not discriminatory. The Commission stated (id. at 793; JA 10):

"• • The record does not show that American exporters have been discriminated against in favor of foreign exporters or that the surcharge, in general, is unjustly discriminatory between shippers and ports. • • •"

However, the Commission did hold that one member of the Far East Conference, Maersk Line, had violated §17 of the Shipping Act, 1916, 39 Stat. 734 (46 U.S.C. §816), because as a Conference member it was assessing the Manila surcharge on newsprint carried from Searsport, Maine, to Manila, while carrying newsprint from St. John, New Brunswick, Canada, to Manila—a trade outside the scope of the Conference Agreement—without the imposition of any surcharge. The Commission found that the Great Northern Paper Company, an exporter of news-

² The inquiry was directed to surcharges imposed on Manilabound cargo by the Pacific Westbound Conference and by several non-conference carriers, as well as the surcharge of the Far East Conference.

print competing with Canadian mills for the Philippine market, had suffered competitive loss of business by reason of the imposition of the surcharge by Maersk Line at Searsport but not at St. John, and that Great Northern had "embarked on a program of diverting newsprint from Searsport, Maine, and has now begun to export from the Canadian port of St. John." (Id. at 794; JA 10-11).

The Commission set forth its "Ultimate Conclusions" in Docket No. 1155, as follows (id. at 794-5; JA 12):

- "1. Respondents are justified in imposing a surcharge on cargo unloaded at the Port of Manila because of the extraordinary delay occasioned by labor difficulties and port congestion.
- "2. Respondents' surcharges, except as noted below, reasonably approximate the additional cost of serving the Port of Manila and are, therefore, not in violation of sections 15, 16, 17 and 18(b)(5) of the Shipping Act, 1916.
- "3. Respondents' surcharges, imposed on a fixeddollar per-ton basis or on a percentage of the freight rate basis, are not unjust or unreasonable in violation of sections 16, First or 17 of the Shipping Act, 1916.
- "4. Respondents, Maersk Line and Pacific Star Line, by imposing a surcharge on newsprint at Searsport, Maine, while they do not apply a surcharge at St. John, New Brunswick, Canada, have demanded, charged, and collected a charge which is unjustly discriminatory between shippers and ports and unjustly prejudicial to exporters of the United States as compared with their foreign competitors contrary to section 17 of the Shipping Act, 1916.

"An appropriate order will be issued."3

³ Pacific Star Line is not, and at no time has been, a member of the Far East Conference.

Thus, on the basis of an evidentiary record compiled at plenary hearings, the Commission concluded that the Conference collectively had violated no provision of the Shipping Act in connection with the imposition of a surcharge on all cargo from all Atlantic and Gulf ports of the United States to Manila. However, on the basis of the conclusion with respect to Maersk Line, it entered an order, dated February 3rd, 1965, directing (id. at 795; JA 13):

" • • • [T]hat respondents Maersk Line and Pacific Star Line cease and desist from assessing on newsprint moving from Searsport, Maine, to Manila, Republic of the Philippines, a surcharge which is prejudicial and discriminatory to exporters of newsprint from the United States and to the Port of Searsport, Maine:".

Apparently dissatisfied with Maersk Line's conduct, the Commission instituted a proceeding in the United States District Court for the Southern District of New York, seeking an injunction for enforcement of the February 3rd order against Maersk in Docket No. 1155. junction was denied on July 28th, 1965. Federal Maritime Commission v. Maersk Line, 243 F. Supp. 561. The court noted that its jurisdiction was dependent upon §29 of the Shipping Act, 1916, 39 Stat. 737 (46 U.S.C. §828), which provides that, "in case of violation of any order of the * * • [Commission], other than an order for the payment of money, the * * * [Commission] * * * may apply to a district court having jurisdiction of the parties; and if. after hearing, the court determines that the order was regularly made and duly issued, it shall enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise." It stated (243 F. Supp. at 562), that the only issue which required consideration was whether Maersk had violated the Commission's order so as to confer jurisdiction under §29.

The court stated that, from the papers before it, it appeared that since the date of the order in Docket No. 1155, Maersk had not assessed or sought to assess the surcharge contained in the Conference tariff (243 F. Supp. at 562-3). This would follow from the fact that, after the date of the order, Maersk vessels had not called at Searsport (243 F. Supp. at 562). Accordingly, there was no violation of the order by Maersk upon which to predicate an enforcement proceeding (id. at 563).

The court did observe (id. at 563):

"If the Commission believes that the Conference surcharge approved in the proceedings above mentioned is now unreasonable, it is free to reopen the proceeding and, if it so finds, to direct the Conference to remove the surcharge. Indeed, if the Commission believes that * * * [the rate differential between St. John and Searsport caused by the surcharge] results in discrimination to United States shippers and to the port of Searsport, this would appear to be an appropriate procedure to follow. * * *"

It was at this point that the proceeding which gave rise to the order under review (hereinafter, the "Order") was initiated. Disdaining to follow the suggestions of the District Court in the Maersk Line case, the Commission did not reopen its Docket No. 1155. Rather, on August 11th, 1965, it served on the present petitioners an order to them to show cause why the Far East Conference Agreement "should not be amended to remove the Port of Searsport from the trading range of the Conference because the applicable tariffs of the Conference result in a situation which is detrimental to the commerce of the United States, contrary to the public interest, and otherwise in violation of the Shipping Act." (JA 32-34.) The order to show cause, captioned in the Commission's new Docket No. 65-29—Imposition of Surcharge by the Far East Con-

ference at Searsport, Maine, provided that the proceeding, "shall be limited to the submission of affidavits and memoranda, replies thereto, and oral argument." The Conference was required to file its memoranda and affidavits no later than August 23rd; Hearing Counsel (the Commission's lawyers) and intervenors, if any, were required to file their memoranda and affidavits no later than September 8th; and no provision was made for reply memoranda or affidavits on behalf of the Conference, or for cross-examination of any persons whose affidavits might be submitted by Hearing Counsel or intervenors. Oral argument was scheduled for September 16th, 1965.

The Conference, in due course, filed a memorandum arguing the points of law involved, and pointing out the defects in the procedure adopted (JA 37-55). Annexed to the memorandum was the affidavit of the Chairman of the Conference, setting forth statistical data which indicated that Searsport had suffered no demonstrable prejudice by reason of the surcharge, and facts and expert opinion regarding the harmful consequences to Searsport and other United States ports if the action proposed in the order to show cause should be taken (JA 56-61).

Great Northern Paper Company, the party supposedly injured by petitioners' activities, did not intervene. The Maine Port Authority did intervene, but filed no memorandum or affidavit. Hearing Counsel filed a reply to the Conference memorandum to which was attached an affidavit of Mr. Joseph Carena, Manager of the International Division of Great Northern Paper Company (JA 81-85). From Mr. Carena's affidavit it appeared that Great Northern's "program" of diverting its Manila-bound cargo from Searsport to St. John consisted of a single shipment, made in January 1964, after which 15 shipments were made through Searsport up to and including August 4th, 1965 (JA 82-83). At the oral argument, the representative of the Maine Port Authority confirmed that there had been

only one cargo diverted from Searsport to St. John (JA 104-5). He also stated, for himself and for Great Northern, that the service from Searsport had been adequate—notwithstanding Maersk Line's discontinuance of calls at that port for Manila-bound newsprint cargo (JA 105).

On the basis of this "record", the Commission, on November 5th, 1965, served the Order (JA 147-8) and its report (JA 122-147). The order directed the Far East Conference to open its newsprint rate from Searsport to Manila on or before November 22nd, 1965. This was the first occasion on which compulsory opening of the rate was even suggested. Failing compliance, "Searsport shall be deleted from the authorized trading range of the Conference."

The Commission's report attempts to explain how the Far East Conference surcharge, which had in February of 1965 been held to violate no provision of the Shipping Act, had, by November of the same year, become violative of \$17 of the Act as applied at Searsport, when the only intervening circumstance was that the Commission had brought an enforcement proceeding against Maersk Line which was unsuccessful because Maersk had not violated the February 3rd order. We leave to our argument the exposition of the errors of fact and law with which the Commission's report is replete. We point out that Commissioner Hearn dissented on the ground that Maersk Line had not violated the order in Docket No. 1155; that since the Far East Conference does not make rates from St. John, it has committed no unlawful discrimination; that service from Searsport was adequate; that the carefully deliberated decision in Docket No. 1155 established the right of the Conference members other than Maersk to assess a Manila surcharge at Searsport; and that compliance with the Order would raise questions of statutory violation with respect to other commodities and shippers of newsprint from United States ports other than Searsport (JA 143-6). Commissioner Patterson dissented for the

reasons advanced by Commissioner Hearn and for the additional reasons that the Commission had no authority to require the opening of the rate in the light of the action proposed in the order to show cause; and that the procedure followed was inadequate to support a holding that the Far East Conference Agreement operated to the detriment of the commerce of the United States (JA 146-7).

Petitioners sought a temporary stay of enforcement of the Order, which was denied (JA 160), and an interlocutory injunction pending disposition of the petition for review on its merits, which was granted (JA 170).

Statutes Involved

The relevant statutory provisions are $\S\S15$, 17, and 23 of the Shipping Act, 1916, as amended, and $\S\S5(a)$ and 7(c) of the Administrative Procedure Act. Because these provisions are lengthy, they are set out in Appendix A to this brief.

Statement of Points

- 1. The Order is based on findings that the Conference is preventing Maersk Line from complying with the Commission's order in Docket No. 1155, and that the Conference is preventing Maersk Line from carrying newsprint from Searsport to Manila. Both findings are clearly erroneous. The "evidence" further negates any inference of competitive detriment to Searsport or any shipper.
- 2. The Order is based on the conclusion that the Conference is responsible for rate discrimination between Searsport, Maine, and St. John, New Brunswick, Canada, and between Great Northern Paper Company and its Canadian competitors. The conclusion is erroneous as a matter

of law since neither the Conference, nor its members acting jointly, control or participate in the making of any rate from St. John or any other Canadian port to any destination.

- 3. The Order would compel the opening of the Conference rate on newsprint from Searsport to Manila under threat of the sanction of modification of the Conference Agreement by deletion of Searsport as a port from which the members may agree on rates. This action the Commission would take under claimed authority of §15 of the Shipping Act. The order to show cause procedure improperly called for §15 action unless cause were shown to the contrary, and denied the full evidentiary hearing required by §§ 15 and 23 of the Shipping Act.
- 4. The proceedings which culminated in the issuance of the Order were unlawful in that:
 - (a) Neither the initiating order to show cause, which was the only notice to the Conference of the Commission's intended action prior to the Conference's sole opportunity to present memoranda and affidavits, nor the memorandum and affidavit of the Commission's Hearing Counsel—the only further notice of the Commission's position prior to the oral argument—stated or intimated that the Commission contemplated compelling the Conference to open its rate on newsprint from Searsport to Manila and, accordingly, petitioners were denied the notice required by §5(a) of the Administrative Procedure Act and the opportunity to be heard with respect to the appropriateness of an order compelling them to open a rate;
 - (b) The petitioners were denied the opportunity to cross-examine adverse witnesses and to adduce rebuttal evidence in violation of their rights under §7(c) of the Administrative Procedure Act; and

- (c) The initiating order, contrary to the requirements of §7(c) of the Administrative Procedure Act, placed the burden of proof on the petitioners.
- 5. The natural and probable consequence of compliance with the Order would be that, in connection with their newsprint carryings from Searsport to Manila, one or more of the member lines would depart from the total charge applicable at other United States Atlantic and Gulf ports under the Conference tariff, with the result that such lines would be subject to charges of unjust discrimination against newsprint shippers using those other ports and against those ports.

Summary of Argument

I. The Order rests on several factual propositions, set forth in the Commission's report, which are plainly erroneous. Thus the Commission states (JA 127) that the discrimination against Searsport found in Docket No. 1155 remains, and that the direct cause thereof is the Far East Conference. The discrimination found in Docket No. 1155 was the assessment by Maersk Line of the Conference surcharge at Searsport, while that Line was assessing no surcharge at St. John. The Commission's order in Docket No. 1155 directed Maersk to cease charging at Searsport a surcharge on newsprint moving to Manila which is unjustly discriminatory, etc. (5 Pike & Fischer SRR 795; JA 13.) Thereafter, Maersk has not carried any newsprint from Searsport to Manila and, accordingly, has not collected any surcharge, unjustly discriminatory or otherwise. Federal Maritime Commission v. Maersk Line, 243 F. Supp. 561 (S.D.N.Y. 1965), held that Maersk Line had not violated the order in Docket No. 1155. Accordingly, the discrimination found in Docket No. 1155 does not remain and the Far East Conference cannot be the cause for its remaining.

The Commission further treats Maersk's discontinuance of service with respect to newsprint from Searsport to Manila as the result of Conference action. On the contrary, it is a deliberate choice of Maersk among several courses which would enable it to comply with the order in Docket No. 1155, viz., to add a surcharge to its St. John rate for newsprint to Manila; to discontinue carrying newsprint from St. John to Manila; to discontinue carrying newsprint from Searsport to Manila; or to withdraw from the Far East Conference and thereby free itself of the obligation to observe the Conference tariff. Maersk may withdraw from the Conference on reasonable notice, and the Conference exercises no control over the frequency and itinerary of any member's service.

The Commission's finding of discrimination in Docket No. 1155 was based on a shipper's claim, in February, 1964, that it had embarked on a program of diverting shipments via St. John, rather than making them from Searsport. The "evidence" is that only one such diversion occurred—in January, 1964.

II. Since the Far East Conference and its members do not jointly make any rate for transportation of any kind from any port in Canada to any destination, it cannot, as a matter of law, be held that the Far East Conference and its members have unjustly discriminated between Great Northern Paper Company and its Canadian competitors or against the port of Searsport. Texas & Pacific Ry. Co. v. United States, 289 U.S. 627 (1933). The Commission has consistently followed Texas & Pacific Ry., and there is no reason to depart from it in the present case.

III. The Order was issued as the result of a proceeding which misapplied §15 of the Shipping Act as recently construed by this Court. In Aktiebolaget Svenska Amerika Linien, et al. v. Federal Maritime Com'n, —— App. D.C.

—, 351 F. 2d 756 (1965), it was held that the Commission may not impose the sanctions of §15 without making one or more of the findings specified in §15 as prerequisite to such action. Such findings must be "adequately supported" and "made on the record". The need for findings based on a plenary hearing is confirmed both by §15, which authorizes the Commission to disapprove, cancel, or modify an agreement only "after notice and hearing", and by §23 of the Shipping Act, which requires that orders relating to violations of the Act "shall be made only after full hearing".

The Commission's Docket No. 65-29 was instituted by an order to the Conference to show cause by legal memoranda and affidavits why the Commission should not amend the Conference Agreement by deleting Searsport therefrom. Thus, entirely apart from the purely procedural deficiencies, the Commission's order of investigation completely reversed the thrust of §15, which requires the approval of agreements unless properly supported adverse findings can be made, and denied to the Conference and its members the full hearing contemplated by §23 and by the decision in Aktiebolaget Svenska.

IV. The first suggestion that the Commission would order the Conference to open the newsprint rate from Searsport to Manila came in the Order. Accordingly, petitioners were denied the notice to which they are entitled under §5(a) of the Administrative Procedure Act, as well as any opportunity to show why such Commission action would be unlawful, or unwise, or both. The procedure underlying the Order was further defective in that it denied to petitioners the rights guaranteed by §7(c) of the Administrative Procedure Act to adduce evidence orally, to cross-examine adverse witnesses, and to adduce rebuttal evidence. Holdings of unlawful discrimination involve complicated factual issues. That the facts here involved

are not well settled in supoprt of the Order is demonstrated by the Commission's conclusion, in February, 1965, on the basis of a full evidentiary record, that petitioners had violated no provision of the Shipping Act, and its conclusion in Docket No. 65-29, on the basis of no record at all, that the petitioners are committing unlawful discriminations. The resolution of adjudicative facts requires a trial. The proceedings were also defective in that the burden of proof was cast upon the Conference, in violation of §7(c) of the Administrative Procedure Act.

V. The opening of a conference rate leaves the member lines free to make their respective rates independently. If the Conference were compelled by the Order to open the newsprint rate from Searsport to Manila, experience teaches that the members' rates would cease to be uniform and the same as the Conference rate applicable at all other United States Atlantic and Gulf ports. The Order, made in the name of elimination of discrimination, would generate it.

ARGUMENT

I. The Order is invalid because it is based on false factual premises.

The Order depends for its validity upon the findings and conclusions made by the Commission in its report in Docket No. 65-29 (JA 122-147). The crucial purported findings are demonstrably erroneous. Accordingly, the conclusions, and the Order premised thereon, are invalid.

The first such finding is that the Far East Conference is causing one of its members, Maersk Line—the only member which has served St. John, New Brunswick, Canada, as well as United States Atlantic and Gulf ports to Manila—to continue to discriminate in favor of St. John

and against Searsport, Maine, in violation of the Commission's order of February 3rd, 1965, in its Docket No. 1155 (JA 127). In Docket No. 1155, after lengthy evidentiary hearings, the Commission concluded that a surcharge imposed by the Conference on cargo carried by its members to Manila from all United States Atlantic and Gulf ports was justified and violated no provision of the Shipping Act. 1916, 39 Stat. 728, as amended (46 U.S.C. §§801-The Commission further concluded that Maersk Line, by applying the surcharge at Searsport but not at St. John, a port outside Conference rate-making control, was unjustly discriminating against Searsport and Great Northern Paper Company, a shipper of newsprint from Searsport to Manila. It ordered Maersk to cease and desist from assessing at Searsport a surcharge which is unjustly discriminatory (JA 13).

Maersk could comply with the Commission's order in Docket No. 1155 by any one of several courses. It could have added an equalizing surcharge to its St. John-Manila rate. It could have discontinued carrying newsprint from St. John to Manila. It could have withdrawn from the Far East Conference, thereby freeing itself of its contractual obligation to assess the surcharge from Searsport. It could have discontinued the carriage of newsprint from Searsport to Manila. Maersk chose the last course. It follows that Maersk is not assessing on newsprint carried from Searsport to Manila an unjustly discriminatory surcharge or any other surcharge. It cannot be violating the Commission's order in Docket No. 1155, and since it is not, the Conference cannot be compelling it to do so.

All of this was known to the Commission when it instituted its Docket No. 65-29 by the order to show cause served on August 11th, 1965 (JA 32-36). The Commission, by then, had already lost a proceeding instituted by it to enforce the Docket No. 1155 order against Maersk.

In Federal Maritime Commission v. Maersk Line, 243 F. Supp. 561 (S.D.N.Y. July 28, 1965), it was held that an enforcement proceeding pursuant to §29 of the Shipping Act, 39 Stat. 737 (46 U.S.C. §828), requires a showing that the Commission's order has been violated. On the present facts, the court held that Maersk had not violated the order in Docket No. 1155 (243 F. Supp. at 562-3).

Thus, the cornerstone on which the entire proceeding in Docket No. 65-29 rested, from the order to show cause to the issuance of the Order here for review, is without substance.

Next, we consider the implication in the Commission's report (JA 130, 132) that the Conference is responsible for the harm to Searsport consequent upon Maersk's discontinuance of service from Searsport to Manila. The representation on behalf of the Maine Port Authority at the oral argument before the Commission that service from Searsport has been adequate, notwithstanding Maersk's action (JA 105), negates a finding of any harm to that port. Even if there were a basis for a finding of harm, it cannot be attributed to the Conference. The Conference in no way regulates the itineraries or frequency of the member lines' services. For that matter, neither does the Commission, since the Shipping Act contains no authorization for the regulation of quantity and frequency, initiation and abandonment of service in United States foreign commerce.

Maersk's action with respect to service at Searsport is its own managerial determination regarding which of several courses that Line would pursue in order to comply with the Commission's order in Docket No. 1155.

The Commission's report (JA 130-1) makes much of the Conference's refusal, on the motion of Maersk Line, to eliminate the surcharge on newsprint from Searsport to

Manila. Commissioner Hearn, in his dissent (JA 143-4; 145), points out the lack of logic in the majority position. The Commission only recently determined in Docket No. 1155 that the surcharge was justified and lawful in the Conference trade because of extra costs due to port congestion at Manila. It defies reason to hold that the Conference was derelict in some public duty in failing to eliminate the thoroughly justified Manila surcharge with respect to the most important cargo moving through the port of Searsport.

A further palpably erroneous factual conclusion underlying the Order is that which relates to prejudice and detriment to the interests of the Great Northern Paper Company and Searsport. The "evidence" adduced by the Commission's Hearing Counsel included a statement of the tonnage of newsprint shipped by Great Northern Paper Company to Philippine ports from the port of Searsport and the port of St. John during the years 1963 and 1964, and from January through August of 1965 (JA 81-3). Only one shipment during the entire period, that on the "S.S. Mazal" on January 25th, 1964, moved via St. John. Every ton other than this shipment moved via Searsport. These data were supplied by the Manager of the International Division of Great Northern Paper Company, Mr. Joseph Carena, who, in February, 1964, testified in F.M.C. Docket No. 1155 that his Company had embarked on a "program" of diverting its shipments from Searsport to St. John. This testimony was adopted in the Commission's report in Docket No. 1155 (5 Pike & Fischer SRR at 794; JA 11). Apparently the "program" was aborted. The only reasonable inference is that shipment via Searsport has continued to be more advantageous than shipment via St. John, notwithstanding the horrible conduct of the Conference.

As to Great Northern's assertion that it has been forced

to absorb the surcharge in order to remain reasonably competitive, there is substantial cause for skepticism which was called to the Commission's attention at the oral argument in Docket No. 65-29 (JA 119-21). Searsport situation was the subject of testimony in "Review of Dual-Rate Legislation 1961-1964", Hearings Before the Subcommittee on Merchant Marine of the Committee on Merchant Marine and Fisheries, House of Representatives, 88th Cong., 2d Sess., on Activities of the Federal Maritime Commission and Its Administration of the Shipping Act of 1916 and Other Laws Under Its Jurisdiction (1964), Serial No. 88-24, pp. 607-9. Data printed at p. 608, setting forth the invoice value of newsprint shipped from Searsport to Manila from 1960 through the first four months of 1964, and based on Bureau of Census records, indicate that the 1964 price was more than \$5.00 per ton higher than the 1963 price. We also call attention to the data offered by the Conference in Docket No. 65-29 (JA 57-59), regarding the carryings of newsprint to the Philippines from the beginning of 1961 through May of 1965. While these data show a falling off of exports from Gulf ports, they show that during 1964, the first full year of the application of the Manila surcharge, shipments from all United States Atlantic ports exceeded shipments during 1962 and 1963. One would expect exporters from Atlantic ports other than Searsport to be affected by Canadian competition in the same degree as Great Northern. Nevertheless, they maintained and, indeed, enlarged the volume of their shipments notwithstanding the surcharge.

We submit, as we shall demonstrate below, that the procedure followed in F.M.C. Docket No. 65-29 was inappropriate for the resolution of such complicated factual issues as rate discrimination and the underlying questions of competition, market advantage and disadvantage,

similarity of transportation conditions, etc. What facts there are in the record contradict, rather than support, the Commission's conclusion that Great Northern and Searsport have been subjected to unjust discrimination and disadvantage by reason of the surcharge.

There remains not one factually substantiated proposition upon which the Order was based. It was founded entirely on illogic and misconception. For this reason alone, it should be set aside and enjoined.

II. As a matter of law, petitioners cannot be held to have discriminated between Searsport, Maine, and any Canadian port.

The Far East Conference Agreement, which is the charter of the petitioners' authority to act jointly in rate matters, provides for the establishment of agreed rates to various Far Eastern destinations, including Manila, for cargo loaded at United States Atlantic and Gulf ports. It does not provide for Conference action with respect to rates from any port in Canada to Manila, or any other destination. There is no shred of evidence that the Conference has ever exercised or attempted to exercise any influence over any rate which any of its members may charge for cargo loaded at any Canadian port.

Notwithstanding this complete lack of any connection between the Conference and any rate from Canada, the Order is based on the holding that the Conference is unjustly discriminating against the port of Searsport, Maine, and a shipper using that port, and in favor of the port of St. John, New Brunswick, Canada, and shippers using that port. That holding violates a principle long established in the law of carrier discrimination and well founded in logic. That principle is that a carrier or group of car-

riers cannot be held to have unlawfully discriminated between two persons or places unless the same carrier or group of carriers controls or participates in the making of the rates charged to both persons or at both places.

The leading case on this point is Texas & Pacific Ry. Co. v. United States, 289 U.S. 627 (1933). There, certain railroads had been charged with discrimination in favor of the port of New Orleans and against certain Texas port cities because rail rates from certain inland points to New Orleans were lower than rail rates from the same points to the Texas ports, although the distance to New Orleans was greater. The Interstate Commerce Commission had held all of the railroad respondents guilty of unjust discrimination even though certain of them had no effective participation in the making of the rates to the Texas ports. It may be noted (289 U.S. at 646) that the I.C.C., after several considerations of the question, had exempted the lines participating in the rates only to New Orleans from its order against the discrimination, "pursuant to a rule which the Commission had consistently followed since its organization: namely, that a carrier may not be held responsible for undue prejudice or preference unless both of the localities affected are upon its lines. or it effectively participates in the rates to both." However, in its final report, the I.C.C. denied exemption to any of the railroad carriers (289 U.S. 646-7), "under the belief that this court had held the principle inapplicable in the circumstances here disclosed."

The Supreme Court upheld the contention of the two railroads seeking exemption from the order, and stated, in its most general terms, the principle which governs the present proceeding (289 U.S. at 649-50):

"• • • The reason for the doctrine is that preference or prejudice can be found only by a comparison of

two rates. If these are the rates of one carrier to point A and that of another to point B while a relationship of one to the other may be determined neither the first nor the second carrier alone can be held to have created the relation. Assuming that neither rate is unreasonable, the one carrier cannot be compelled to alter its rate, because the other's is higher or lower for the same service. A carrier or group of carriers must be the common source of the discrimination must effectively participate in both rates, if an order for correction of the disparity is to run against it or them. Where an order is made under §3 an alternative must be afforded. The offender or offenders may abate the discrimination by raising one rate, lowering the other, or altering both. . . The situation must be such that the carrier or carriers if given an option have an actual alternative.

"The principle has been approved in decisions of this court with respect to practices, * * and rates * * ." (Emphasis supplied.)

Again (289 U.S. at 654-5), the Court said:

"We find nothing in any of the decisions which renders inapplicable the principle upon which the Commission has acted, with the approval of this court, for more than forty years in the administration of §3, and conclude that the New Orleans lines could not properly be held guilty of unjust discrimination against the Texas ports in the absence of a finding of effective participation in the rates to them."

In Docket No. 1155 the Commission showed that it understood the nature of the order to be made in a discrimination case. There, having found unlawful discrimination by Maersk Line, which served both Searsport and St. John, the Commission did not order Maersk to eliminate the sur-

charge at Searsport, or to impose one at St. John⁴, or to take any other specific measure to abate the discrimination. It ordered Maersk to discontinue assessment of a discriminatory surcharge, leaving it to Maersk to select the appropriate means. This was feasible where the carrier subject to the order served both ports involved in the disparity.

The Commission, of course, could give no choice of means to the Far East Conference. What it failed to recognize was that the same circumstance which precluded a choice for the Far East Conference equally precluded a holding that the Conference was unlawfully discriminating.

If the Conference established rates from St. John as well as from Searsport, and applied a Manila surcharge at the latter port but not at the former, the situation would be entirely different. The same rate-making body would be according different treatment to two different points of origin. Absent an appropriate justification, this would constitute unjust discrimination. The Conference would then truly be in a position to eliminate the discrimination—and without necessarily sacrificing the surcharge to which it was so recently held to be entitled. It could, if it wished to do so, eliminate the surcharge at Searsport. However, it could instead impose a surcharge on cargo lifted at St. John. A third possibility would be the imposition of a lesser surcharge at St. John and a reduction of the surcharge at Searsport to equalize the treatment of the ports.

The Commission appears to be of the view that, by the action which it took, it has found the means to equalize Searsport with St. John. This, of course, is an illusion. While enforcement of the Order might, as the purely coin-

⁴ Indeed, the Commission could not have ordered Maersk to take any particular rate action at St. John, since the Commission's rate authority does not extend to foreign-to-foreign trades and, in any event, is quite limited in the foreign commerce of the United States.

cidental result of open rate competition, produce rough equality between the rates which the Far East Conference members charge at Searsport and the rates which they may charge if, as and when they serve St. John, the Order has no effect upon the rates which lines not members of the Conference may charge at St. John to Manila. As the Commission found in Docket No. 1155, St. John was being served to Manila by Pacific Star Line, which is not a Conference member. Pacific Star is perfectly free to charge, both at Searsport and at St. John, a rate to Manila which is lower than the Conference rate from Searsport. No matter what reductions the Conference might make in its Searsport rate, Pacific Star would be free to make further reductions in its St. John rate. Thereby is illustrated the folly and the danger inherent in the Commission's approach.

The Commission seems to believe that the Conference somehow bears a vicarious responsibility for the rate action of its member, Maersk, at St. John. From what we have already stated regarding the lack of Conference control over rates from Canada, it should be clear that the imputation is ill-founded. It is just as foolish and dangerous to try to compel the Conference to maintain its Searsport charge on a parity with Maersk's St. John charge as it would be to try to force the Conference to maintain parity with Pacific Star Line or any other carrier which at St. John quotes a lower rate to Manila than the Conference rate applicable at United States ports. Such a policy would tie Conference rates from two major coastal ranges of the United States to the rate policy of a line serving foreign ports.

All considerations point to the wisdom of applying the rule of Texas & Pacific Ry. to the present case. The Commission has consistently applied Texas & Pacific Ry. in its decisions under the Shipping Act. That case was specif-

ically cited in support of the proposition which we here urge in L.A. Traf. Mgrs. Conf., Inc., v. S. Calif. Crl'd'g. Tariff Bur., 3 F.M.B. 569, 575 (1951); D.L. Piazza Company v. West Coast Line, Inc., et al., 3 F.M.B. 608, 615 (1951). The principle of Texas & Pacific Ry. was followed without citation in Terminal Charges at Norfolk, 1 U.S.S. B.B. 357, 358 (1935); Huber Mfg. Co. v. N.V. Stoomvaart Maatschappij "Nederland", 4 F.M.B. 343, 347 (1953); and West Indies Fruit Co., et al. v. Flota Mercante, 7 F.M.C. 66, 71 (1962).

The Commission's report in Docket No. 65-29 seeks to sidestep Texas & Pacific Ry. on the rather arrogant ground that the Commission considers a Supreme Court decision too restrictive upon its powers (JA 139). To lend the color of deference to superior judicial authority, the report cites, in footnote 7, New York v. United States, 331 U.S. 284, 342 (1947), as authority for its disregard of Texas & Pacific Ry. The footnote states that the Interstate Commerce Act provision involved in New York v. United States is similar to Shipping Act provisions. To reach such a conclusion, the Commission must have neglected to read pp. 289 to 341, and pp. 343 to 351 of the majority opinion.

A consideration of the entire opinion in New York v. United States shows that the action there under review was taken under several grants of authority. The Interstate Commerce Act prohibition against preference, prejudice, and discrimination had, in 1940, been amended to extend the protection thereby granted to any "region, district, territory" of the United States. In addition, there was a congressional direction to the I.C.C. to institute an investigation into rates between points in different classification territories to determine whether those rates were "unjust and unreasonable or unlawful in any other respect in and of themselves or in relation to each other." 331

U.S. at 297. (Emphasis supplied.) The rate order there under review had required the establishment of just and reasonable rates to supplant rates found to be unjust and unreasonable. This the I.C.C. was authorized to do under §§1 and 15(1) of the Interstate Commerce Act—provisions which have no counterpart in the Shipping Act as it applies to the foreign commerce of the United States.

Indeed, if the Commission had read the few sentences immediately preceding and immediately following the material quoted from New York v. United States in its footnote 7, it would have appreciated the utter irrelevancy of New York v. United States. After referring to Texas & Pacific Ry., and a similar decision, the Court said (331 U.S. at 342-3):

" • Those cases hold that the Commission may not require carriers to do what they are powerless to perform. But the Court recognized in Central R. Co. v. United States, supra, p. 257, that where the Commission acts pursuant to § 1 to require carriers to establish, in connection with through routes and joint rates, reasonable rules and regulations, that problem is not involved. For then the Commission corrects the unlawful discriminatory practice in the case of each carrier by prescribing the just and reasonable rate or practice. The same is true where, as here, the Commission in order to eliminate territorial discriminations proceeds under § 15 (1) to fix new reasonable rates. If the hands of the Commission are tied and it is powerless to protect regions and territories from discrimination unless all rates involved in the rate relationship are controlled by the same carriers, then the 1940 amendment to §3 (1) fell far short of its goal. We do not believe Congress left the Commission so impotent.

"It may not be said in this case, as it was held in Texas & Pacific R. Co. v. United States, supra, p. 633, that there was no evidence of the unreasonableness of the rates, or that that question was not in issue. The Commission here found that the rates were unjust and unreasonable under §1 and it proceeded to fix new rates under §15 (1). The facts which establish that the differences in rates as between the several territories are not warranted by territorial conditions plainly sustain its findings under §1." (Emphasis supplied.)

This passage suggests that the Commission does not agree with Mr. Justice Cardozo when, as a judge of the New York Court of Appeals, he said in Cott v. Erie R.R. Co., 231 N.Y. 67, 73 (1921): "Precedents will be misleading if separated from the statutes they interpret. Opinions get their color and significance from the subject of the controversy."

We submit that the rule of Texas & Pacific Ry. is eminently sound and binding upon the Commission. Because the Order is predicated on a holding of unlawful discrimination which is contrary to that rule, the Order is invalid.

III. The proceeding on which the Order was based disregarded the requirements of §§15 and 23 of the Shipping Act.

The order to show cause which instituted Docket No. 65-29, directed petitioners to show why their Conference Agreement, approved since November of 1922, should not be "amended" by the deletion therefrom of Searsport, Maine, as a port from which the Conference might estab-

⁵ We do not make any point of the fact that §15 of the Shipping Act authorizes the Commission to "disapprove, cancel or modify any agreement", but nowhere authorizes it to amend an agreement.

lish rates. In effect, the proceeding was so framed that the Commission would amend petitioners' approved Agreement unless the petitioners should show reasons why it should not be amended.

Thus framed, the proceeding reversed the entire thrust of §15. This is plain from the language of the second paragraph of that Section and from a recent decision of this Court interpreting it.

The second paragraph of §15 of the Shipping Act, 1916, as amended, 75 Stat. 763 (46 U.S.C. §814), provides, so far as is here material:

"The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement,

* * whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements. * * * " (Emphasis supplied.)

Thus the Commission is directed to approve agreements intact unless it makes one of the specified findings prerequisite to disapproval, cancellation, or modification of an agreement. The order instituting Docket No. 65-29 indicated that the petitioners' Agreement would be modified unless petitioners should demonstrate that it was entitled to enjoy continued approval intact. The statutory program of §15 was thus inverted and subverted.

In Aktiebolaget Svenska v. Federal Maritime Com'n, — App. D.C. —, 351 F. 2d 756 (1965), this Court had before it for review an order of the Commission imposing §15 sanctions on the ground that the conference agree-

ment before it appeared inimical to the public policy embodied in the antitrust laws. In the review proceeding, this Court was unable to discern any finding conforming to the §15 prerequisites for disapproval. The Court said (351 F. 2d at 760):

"We must remand the order disapproving the unanimity rule to the Commission for reconsideration, with directions either to make supporting findings which adequately sustain the ultimate finding that the unanimity rule operates to the detriment of the commerce of the United States, or, if this cannot be done, to vacate that ultimate finding and approve the contract in this respect " . "

"Although the Commission disapproved the tieing rule under 46 U.S.C. § 814, we are unable to find any ultimate factual conclusion within those specified in that section which would support its disapproval. That is, there is no finding that the rule is 'unjustly discriminatory or unfair as between carriers, " " that it operates to the detriment of the commerce of the United States, or is contrary to the public interest, or is in violation of 'this chapter.' In the absence of such a specific finding, the rule is, by direction of Section 814, to be approved." (Emphasis supplied.)

Again (351 F. 2d at 761), this Court said:

"We do not read the statute as authorizing disapproval of an agreement on the ground that it runs counter to antitrust principles, the theory on which seemingly the Commission's disapproval rests here. Many of the matters covered by conference rules are restrictive and even monopolistic in tendency. Yet, if the agreement is approved under 46 U.S.C. § 814, an exemption from the antitrust laws is specifically given by that section. The statutory language author-

izes disapproval only when the Commission finds as a fact that the agreement operates in one of the four ways set out in the section by Congress. See the dissent of Commissioner Patterson, joined by Commissioner Day, on this point, emphasizing that the need for the rule from a competitive standpoint has not been made a standard for approval or disapproval by the statute."

It was perhaps due to this recent instruction in the reading of the statute which it administers that the Commission warped and twisted the facts in the present case into "findings" of the character prescribed by §15. However, it is clear that the entire proceeding before the Commission was conceived in utter disregard for the plain intendment of §15 and this Court's decision in Aktiebolaget Svenska.

The clear purport of §15 properly construed is that, in the absence of evidence taken at a hearing, no finding can be made; and in the absence of a properly made finding of one of the criteria for Commission disapproval, cancellation, or modification, the agreement must be approved. Under the initiating order in Docket No. 65-29, the Agreement was to be modified unless the parties to the Agreement should make a negative case by showing factual and legal cause why the Agreement should not be modified.

The Commission also did not note that in Aktiebolaget Svenska this Court gave clear instructions as to the manner in which appropriate findings must be made. This Court said (351 F. 2d at 751-2):

"Since there is no finding here that the tieing rule operates in any one of the four ways which Congress prescribed in 46 U.S.C. § 814 for disapproval, we must return the case to the Commission. Such a finding is not for us to make. Accordingly, we remand for the purpose of reconsideration, with directions that either

an adequately supported ultimate finding be made which warrants disapproval under the statute, or if no such finding can be made on the record, that the tieing rule be approved as directed by 46 U.S.C. § 814." (Emphasis supplied.)

Thus did this Court make it manifest that the Commission was not to pay lip service to the opinion and merely rewrite its findings. The findings were to be adequately supported on a record. So much is plainly required not only by §15, which states that the findings must be made "after notice and hearing." Section 23 of the Shipping Act, 1916, 39 Stat. 736 (46 U.S.C. §822), specifies that orders relating to violations of the Act, "shall be made only after full hearing" (emphasis supplied).

We do not argue that a full evidentiary hearing is required as a matter of ritual even in a case where a pure question of law or of the interpretation of an agreement is involved, and the facts or the terms of the documents are not in dispute. However, where, as here, the Commission has just finished holding that the petitioners' conduct is completely lawful and non-discriminatory, we submit that it requires a *full* hearing to enable the Commission to turn 180° and find that the same conduct of the petitioners is now unlawfully discriminatory.

The Commission's Docket No. 65-29 was conceived and prosecuted in contravention of the plain terms of §§15 and 23 of the Shipping Act and, accordingly, the Order eventuating therefrom is invalid.

IV. The procedure in Docket No. 65-29 deprived petitioners of substantial rights under the Administrative Procedure Act.

A basic element of fair procedure when a governmental agency proposes to require action of members of a regulated industry is notice to them of what the agency proposes to do. This element is codified in §5(a) of the Administrative Procedure Act, 60 Stat. 239 (5 U.S.C. §1004(a)). Under the statute, in every adjudicatory case required to be determined on a record after hearing, "Persons entitled to notice of an agency hearing shall be timely informed of * * * (3) the matters of fact and law asserted." While it might be contended that advance notice of the action contemplated by the agency is not required if it is of the character clearly specified in the agency's enabling statute, e.g., an order to cease and desist from an unlawful discrimination, no such argument can be made with reference to an order which directs action not specifically provided in the enabling statute, and not even remotely hinted at in the order instituting the proceedings and notice thereof.

The Shipping Act makes no mention of any authority for the Commission to direct the opening of a conference rate. Where the level of a rate in the foreign commerce of the United States is in issue, the Commission's only authority is to disapprove that rate under §18(b)(5) of the Shipping Act, 1916, as amended, 75 Stat. 765 (46 U.S.C. §817(b)(5)). Where a rate is unjustly discriminatory, the Commission may, under §17 of the Act, 39 Stat. 734 (46 U.S.C. §816), order the discontinuance of the charging of a discriminatory rate. If a rate is made pursuant to an agreement and furnishes the basis for one or more of the adverse findings required in §15, the Commission may disapprove, cancel or modify the agree-

ment. These are the Commission actions of which ocean carriers have notice from the statute itself.

If the order to show cause had warned petitioners that the Commission was contemplating a direction that their newsprint rate from Searsport to Manila be opened, the petitioners would have had the opportunity to put forward factual and legal reasons why the Commission should not take such action. It was not until all opportunity for petitioners to be heard had passed that the Commission, for the first time in its final order, directed petitioners to take that action.

The Commission in its report (JA 134-5) justifies this departure from fair procedure on the theory that the requirement to open a single rate from Searsport is "lesser action" than the modification of the Conference Agreement proposed in the order to show cause and, therefore, is obviously appropriate. This would appear to be an attempted analogy to the "lesser included offense" doctrine of criminal law. However, the Commission acknowledges that it is indulging in a "resort to individual rate fixing". This, we submit, is a power which the Commission does not have in relation to rates in the foreign commerce of the United States. The Commission is not authorized to determine and order established just and reasonable rates. Its only authority over rate levels in foreign commerce is, as we have said above, the limited authority to deal with outrageously high or low rates which have a proven detrimental effect on United States commerce. Even then, the Commission may not order the charging of what it conceives to be the correct rate. It may only disapprove the bad rate.6 With proper notice

⁶ See Cong. Rec., Sept. 14, 1961, pp. 18248-9 for statements during debate on the provision which became §18(b)(5) of the Act These passages are reproduced in *Index to the Legislative History of the Steamship Conference/Dual Rate Law*, Public Law 87-346 (75 Stat. 762), Sen. Doc. No. 100, 87th Cong., 2d Sess. (1962) 424-6.

the petitioners might have been able to persuade the Commission to avoid exceeding its authority and to protect themselves from the consequences of such excess which are pointed out under heading V, infra.

A further procedural defect in Docket No. 65-29 lies in its imposition on the petitioners of the burden of proving, by the limited means afforded under the order to show cause, that a proposed Commission action should not be taken. We have already shown that this approach violated the concepts of §15 of the Shipping Act. However, it further violated both §7(c) of the Administrative Procedure Act, 60 Stat. 241 (5 U.S.C. §1006(c)), and the Commission's own Rules of Practice and Procedure.

Section 7(c) provides: "Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof." The Commission's Rules of Practice and Procedure (46 C.F.R. §502.155), after excepting suspension proceedings under §3 of the Intercoastal Shipping Act, 1933, provide, "In all other cases, the burden shall be on the proponent of the rule or order."

It hardly needs argument that it was the Commission and not the petitioners who were proposing the order in Docket No. 65-29. Accordingly, the procedure which called upon the petitioners to show cause why the proposed order should not be made violated both §7(c) of the Administrative Procedure Act and the Commission's own Rules.

Having given petitioners no notice that it even contemplated a direction to open a rate, and having placed upon petitioners the burden of demonstrating that the action proposed in the order to show cause should not be taken, the Commission established a procedure for the resolution of the issues in Docket No. 65-29 which deprived the petitioners of their right to cross-examine witnesses against them, to present their case orally, and to submit rebuttal evidence. The order to show cause (JA 33) specifically provided that "This proceeding shall be limited to the submission of affidavits and memoranda, replies thereto, and oral argument." Petitioners were required to submit their affidavits and memoranda first; reply affidavits by the Commission's Hearing Counsel and intervenors, if any, were to follow; and no further opportunity was afforded for the petitioners to adduce evidence in any manner whatsoever.

Section 7(c) of the Administrative Procedure Act, 60 Stat. 241 (5 U.S.C. §1006(c)), provides that "Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." It may be noted that the final sentence of §7(c) limits the authorization for the adoption of procedures for the submission of all or part of the evidence in written form to rule making, or determining claims for money or benefits, or applications for initial licenses.

We do not contend that the requirements of §7(c) must be observed even in cases where they would not be meaningful. We do contend that the present proceeding involved disputed issues of "adjudicative" facts, and that, accordingly, the right to a full factual trial was improperly denied. 1 Davis, Administrative Law Treatise, 412-14.

The Commission7 itself has frequently described the

⁷ We refer to the Commission and its variously designated predecessors (United States Shipping Board, United States Shipping Board Bureau, United States Maritime Commission, and Federal Maritime Board) as the "Commission."

many complex factual issues raised by the charge of unjust discrimination or unlawful preference or prejudice, and the necessity that the elements of the charge be established by real evidence. Thus in Port of New York Authority v. Ab Svenska, et al., 4 F.M.B. 202, 205 (1953), the Commission said with respect to §§16 and 17 of the Shipping Act:

"In order to sustain the charge of unjust discrimination, under these provisions of the Shipping Act, complainant must prove (1) that the preferred port, cargo, or shipper is actually competitive with complainant, (2) that the discrimination complained of is the proximate cause of injury to complainant, and (3) that such discrimination is undue, unreasonable, or unjust. Phila. Ocean Traffic Bureau v. Export S.S. Corp., 1 U.S.S.B.B. 538, 541 (1936); H. Kramer & Co. v. Inland Waterways Corp. et al., 1 U.S.M.C. 630, 633 (1937). In the first of these cases the Secretary of Commerce said:

"'It is well settled that the existence of unjust discrimination and undue prejudice and preference is a question of fact which must be clearly demonstrated by substantial proof. As a general rule there must be a definite showing that the difference in rates complained of is undue and unjust in that it actually operates to the real disadvantage of the complaint. In order to do this it is essential to reveal the specific effect of the rates on the flow of the traffic concerned and on the marketing of the commodities involved, and to disclose an existing and effective competitive relation between the prejudiced and preferred shipper, localities, or com-Furthermore, a pertinent inquiry is modities. whether the alleged prejudice is the proximate cause of the disadvantage."

See, also, Boston Wool Trade Association v. M. & M. T. Co., 1 U.S.S.B. 24, 29-30 (1921); American Peanut Corp. v. M. &M.T. Co. et al., 1 U.S.S.B. 78, 79 (1925); The Huber Manufacturing Co. v N.V. Stoomvaart Maatschappij "Nederland", 4 F.M.B. 343, 347 (1953).

The Commission or its counsel have suggested that the petitioners had their opportunity to adduce evidence and cross-examine adverse witnesses at the hearings in Docket No. 1155 and that, accordingly, they are not entitled to a trial on the issue of unjust discrimination and undue prejudice in the present proceeding. Such a view ignores the fact that, in Docket No. 1155, the Commission held that the Conference had not unjustly discriminated or committed any unlawful preference or prejudice. Insofar as the Commission held that Maersk Line had discriminated, the Conference was in no position to seek review even though it disagreed vehemently with the Commission's conclusion. It had won its case and, therefore, was not a "party aggrieved" by the order in Docket No. 1155. Under the terms of §4 of the Judicial Review Act (Federal Agencies), 64 Stat. 1130 (5 U.S.C. §1034), the Conference would have had no standing to seek review of the Commission's decision in Docket No. 1155.

So far as the Conference is concerned, the Commission had to start with a clean slate in order to make a valid finding that it had committed unjust discrimination and imposed undue prejudice against either Searsport or Great Northern Paper Company. For this purpose, the only valid proceeding would have been a full evidentiary hearing. At such a hearing, the Conference would have had the opportunity to cross-examine Mr. Carena regarding the "program" of Great Northern Paper Company for diversion of shipments of newsprint from Searsport to St. John, and regarding the inconsistency between his claim that Great Northern has had to absorb the sur-

charge and the published statistics indicating that Great Northern has raised the price of its exported newsprint. At such a hearing the Conference could have produced rebuttal evidence regarding the dissimilarity of transportation conditions between the port of Searsport and the port of St. John-a critical factor, according to Commission decisions, in determining whether any conclusion may be based upon a comparison of rates in different See, Port Differential Investigation, 1 U.S.S.B. 61, 70-1 (1925); New Orleans Board of Trade v. Luckenbach S.S. Co., et al., 1 U.S.S.B.B. 346, 348 (1934); Alaskan Rate Investigation No. 3, 3 U.S.M.C. 43, 45-6 (1948); L.A. Traf. Mgrs. Conf. Inc. v. S. Calif. Carl'd'g. Tariff Bur., 3 F.M.B. 569, 580 (1951). Perhaps with a full evidentiary record, the Commission would have realized the folly of attempting to make the "findings" which litter its report in Docket No. 65-29.

That the rights guaranteed by §7(c) of the Administrative Procedure Act are not to be relegated to the limbo of pious exhortations, honored in the breach more than in the observance, is indicated by the Report of the Senate Committee on the Judiciary, Sen. Rep. No. 752, 79th Cong., 1st Sess., on S. 7 (1945), reprinted in Administrative Procedure Act, Legislative History, 79th Congress, 1944-46, Sen. Doc. No. 248, 79th Cong., 2d Sess. (1946), at 208-209, where the Committee, in commenting on that section said:

"That the proponent of a rule or order has the burden of proof means not only that the party intiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain. * Except as applicants for a license or other privilege may be required to come forward with a prima facie showing, no agency is entitled to presume that the conduct of

any person or status of any enterprise is unlawful or

improper.

"The second and primary sentence of the subsection is framed on the theory that an administrative hearing is to be compared with an equity proceeding in the courts. The mere admission of evidence is not to be taken as prejudicial error (there being no lay jury to be protected from improper influence) although irrelevant and unduly repetitious evidence is to be excluded as a matter of efficiency and good practice; and no finding or conclusion may be entered except upon evidence which is plainly of the requisite materiality and, competence; that is, 'relevant, reliable, and probative evidence.' Thus while the exclusionary 'rules of evidence' do not apply except as the agency may as a matter of good practice simplify the hearing and record by excluding obviously improper or unnecessary evidence, the standards and principles of probity and reliability of evidence must be the same as those prevailing in courts of law or equity in nonadministra-There are no real rules of probity and reliability even in courts of law, but there are certain standards and principles—usually applied tacitly and resting mainly upon common sense—which people engaged in the conduct of responsible affairs instinctively understand and act upon. They may vary with the circumstances and kind of case, but they exist and must be rationally applied. These principles, under this subsection, are to govern in administrative proceedings.

"The right of cross-examination extends, in a proper case, to written evidence submitted pursuant to the last sentence of the subsection as well as to cases in which oral or documentary evidence is received in open hearing. Even in the latter case, subject to the appropriate safeguards, technical data may as a matter of convenience be reduced to writing and introduced as in courts. The written evidence provision

of the last sentence of the subsection is designed to cover situations in which, as a matter of general rule or practice, the submission of the whole or substantial portions of the evidence in a case is done in written form. In those situations, however, the provision limits the practice to specified classes of cases and, even then, only where and to the extent that "the interest of any party will not be prejudiced thereby." To the extent that cross-examination is necessary to bring out the truth, the party should have it. Also, an adequate opportunity must be provided for a party to prepare and submit appropriate rebuttal evidence." (Emphasis supplied.)

We submit that each of the procedural errors which infect Docket No. 65-29 is sufficient to invalidate the Order. Considered cumulatively, they overwhelmingly destroy its validity.

V. The Order would create more discriminations than it is intended to eliminate.

The Order was made for the purpose of putting an end to a discrimination between Searsport and St. John, and between Great Northern Paper Company and its Canadian competitors. The means to this end was to require the Conference to relinquish control of its members' rates for newsprint from Searsport to Manila. The fifteen members of the Conference would then be in open competition with each other and with any non-Conference lines which might serve the trade involved.

Historically, open-rate competition among ocean common carriers has inevitably led to rate war and vicious cutting of rates. See, H.R. Doc. 805, 63rd Cong., 2d Sess. (1914) 416-17—the report upon which the Shipping Act,

1916, was based. If this historical consequence should follow upon compliance with the Commission's Order, the Conference members' respective newsprint rates would not only not be uniform, but would also be lower than their collective rate applicable from all other United States Atlantic and Gulf ports.

The data submitted by the Conference in response to the Commission's order to show cause demonstrate that very substantial quantities of newsprint do move to the Philippines on Conference vessels from United States Atlantic ports other than Searsport (JA 58, 61). Since the consistent pattern of Conference rate-making has been uniformity as among United States Atlantic and Gulf ports, it would appear inevitable that compliance with the Order would bring about numerous charges that the Conference was discriminating unjustly in favor of Searsport and against all other United States Atlantic and Gulf ports.

On the other hand, as the Maine Port Authority representative stated at the oral argument in Docket No. 65-29, it is recognized that the lines have been serving Searsport only as and when sufficient cargo is offered at that port to justify a call there by a large ocean-going vessel. It may well be a consequence of the Order that service from Searsport will become so unattractive as to be discontinued or seriously curtailed. In such event, a shipper through Searsport might have to offer a higher freight rate than the present rate in order to induce the carriers to serve that port. In either case, Searsport would be suffering a greater disadvantage than it now does by reason of Maersk Line's discontinuance of the carriage of newsprint from Searsport to Manila.

We realize that this Court would be most reluctant to substitute its evaluation of the transportation circumstances for that of the administrative agency charged with the administration of the Shipping Act. However, we are confident that the Court will not be reluctant to view the Order in the light of plain common sense. In so doing, it may take comfort from the fact that two of the Commissioners, Commissioner Patterson and Commissioner Hearn, perceived that the Order potentially would create the very consequences which the Shipping Act condemns and which it was the object of the Order to prevent.

CONCLUSION

For the foregoing reasons, the Order of the Commission here for review should be determined to be invalid and should be set aside, and its enforcement should be perpetually enjoined.

New York, N. Y. January 31st, 1966.

Respectfully submitted,

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APPENDIX A

Statutory Provisions Involved

I. Sec. 15, Shipping Act, 1916, 39 Stat. 733, as amended by 75 Stat. 763 (46 U.S.C. §814):

That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to

the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and con-

sidering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 14b of this Act which do not involve a change in the spread between such rates and

charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 18(b) hereof and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 14b, shall be excepted from the provisions of the Act approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", and amendments and Acts supplementary thereto, and the provisions of sections 73 to 77, both inclusive, of the Act approved August 27, 1894, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 14b shall be liable to a penalty of not more than \$1,000 for each day such violation continues, to be recovered by the United States in a civil action.

II. Sec. 17, Shipping Act, 1916, 39 Stat. 734 (46 U.S.C. §816):

That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the * * [Commission] finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall dis-

continue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or

charge.

Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the • • [Commission] finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

III. Sec. 23, Shipping Act, 1916, 39 Stat. 736 (46 U.S.C. §822):

Orders of the * * [Commission] relating to any violation of this Act shall be made only after full hearing, and upon a sworn complaint or in proceed-

ings instituted of its own motion.

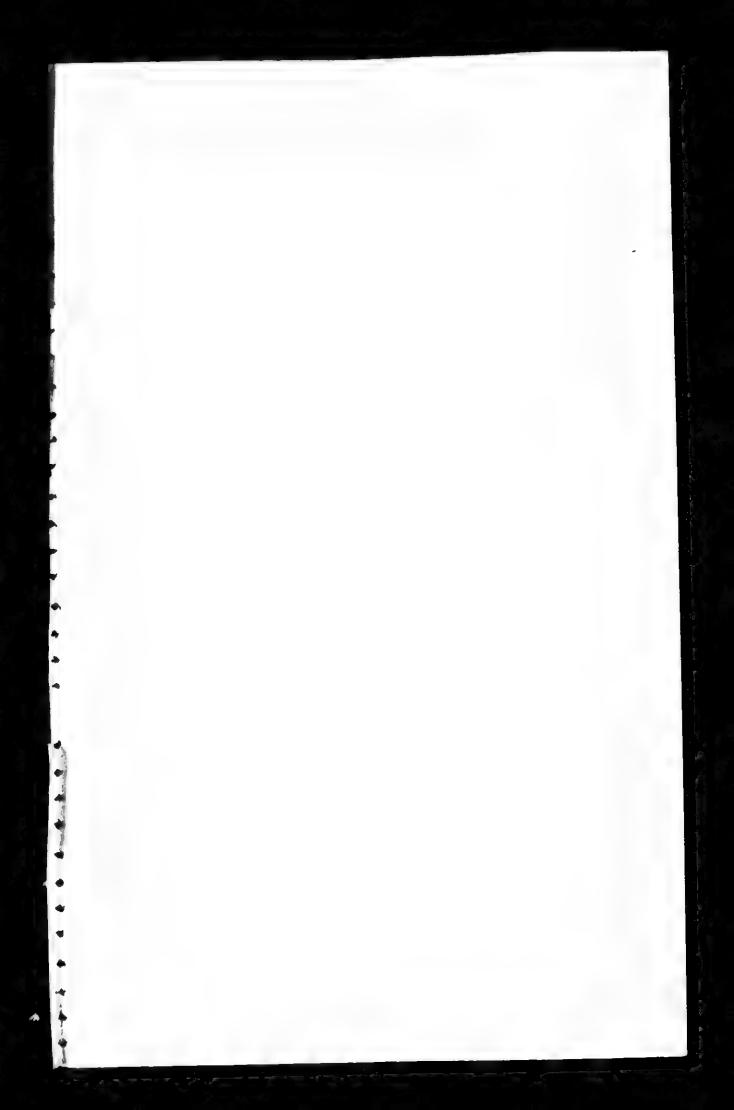
All orders of the • • • [Commission], other than for the payment of money, made under this Act, as amended or supplemented, shall continue in force until its further order, or for a specified period of time, as shall be prescribed in the order, unless the same shall be suspended, or modified, or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

IV. Sec. 5(a), Administrative Procedure Act, 60 Stat. 239 (5 U.S.C. \$1004(a)):

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

- (a) Notice.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.
- V. Sec. 7(c), Administrative Procedure Act, 60 Stat. 241 (5 U.S.C. §1006(c)):
- SEC. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—
 - (c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon

consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.



IN THE

United States Court of Appeals for the district of columbia circuit No. 19,790

FAR EAST CONFERENCE, et al.,

Petitioners,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,

Respondents.

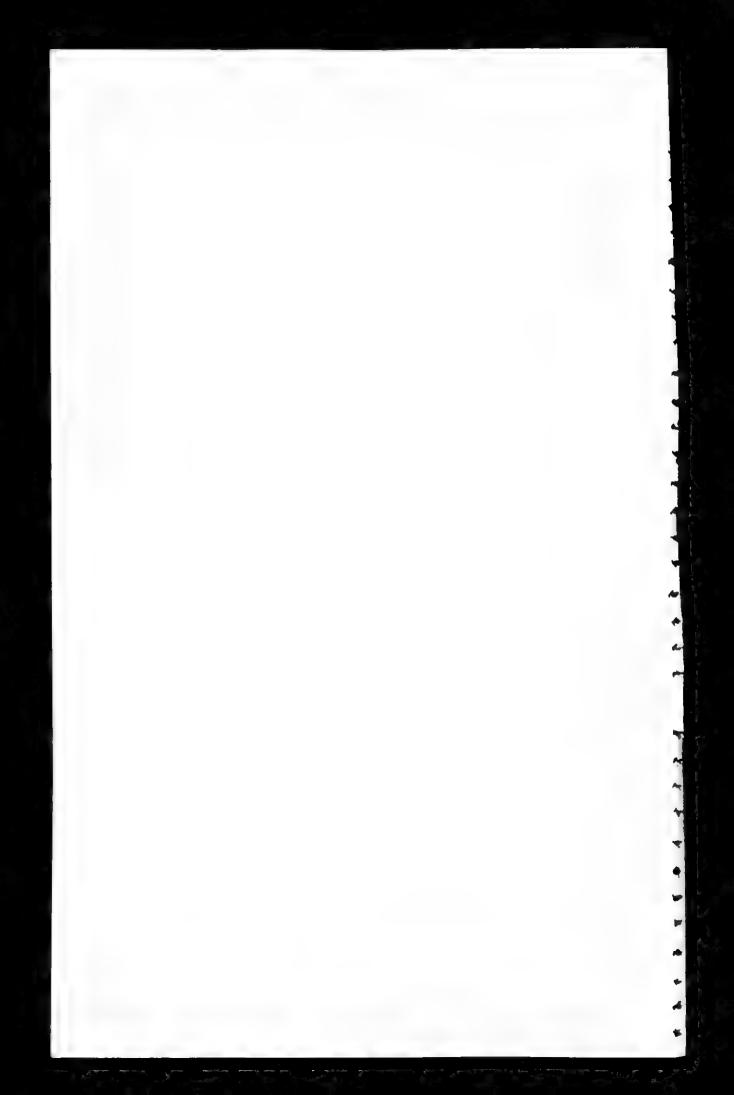
ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL MARITIME COMMISSION

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REPLY BRIEF FOR THE PETITIONERS

General Observations

It is not surprising that in their loyal defense of the order under review, the respondents perpetuate in their brief the Wonderland of mismated "facts" and "law" which characterized the Commission's report on which the Order was predicated. While the unlawfulness, illogic and unfairness of the Commission's action was thoroughly discussed in our principal brief, we feel compelled to take the opportunity of a reply brief to point out the lack of substance in some of the superficially plausible propositions advanced by the respondents.

I. Respondents have not demonstrated how petitioners can be guilty of unlawful discrimination.

A. The Facts Negate Discrimination or Disadvantage.

Although respondents concede (R. br. 21) that the Commission had, shortly prior to the present proceeding, held that the petitioners were justified in imposing a surcharge on cargo discharged at Manila because of extraordinary circumstances at that port, and although they agree (R. br. 1-2) that the Far East Conference does not cover Canadian Atlantic ports, they nevertheless attempt to justify the attribution of responsibility to the Conference for a discrimination earlier held to have been committed by one of its member lines, and since found by a court to have been terminated.

¹ Throughout, we will refer to the brief of respondents as, "R. br. —", and to our principal brief as, "P. br.—".

The effort tangles the respondents in a web of contradictions. Thus, they state (R. br. 1) that the proceeding under review, Docket No. 65-29, "was the outgrowth of" Docket No. 1155, decided six months earlier. Notwithstanding that the Commission held in Docket No. 1155 that the Conference surcharge to Manila violated no provision of the Shipping Act, and then in Docket No. 65-29 held that it violated all of the standards of §15 of the Act, respondents contend (R. br. 12) that the decision in Docket No. 65-29 did not "compromise" the earlier holding in Docket No. 1155. "Compromise" would seem to be too gentle a term!

At another point (R. br. 14), respondents argue that the Commission used in Docket No. 65-29 the facts which it had found in Docket No. 1155. It must have abused the facts in one case or the other in order to draw opposite conclusions from them. We submit that the conclusion in the earlier case, predicated on full hearings before an examiner, briefs, exceptions, and argument to the Commission, was correct.

Respondents emphasize the permanence of the facts found in the earlier case. Speaking of Docket No. 65-29, they state (R. br. 14):

"• • • The Commission utilized one other fact of a negative [sic] nature. That fact was that nothing had occurred subsequent to the order in Docket No. 1155 which changed the situation then prevailing."

If nothing changed the situation, why was the decision in Docket No. 1155 in effect reversed? However, the respond-

ents elsewhere are not content to rest with this absurdity. They refer (R. br. 13) to "findings" predicated on the single affidavit annexed to their own counsel's memorandum in response to the order to show cause (JA 81-85). The author of that affidavit could not, under the order to show cause procedure, be subjected to cross-examination. Yet, his word was accepted even though, as we pointed out in our principal brief (P. br. 16), he had previously proven most unreliable in explaining his company's "program" of diverting its shipments from Searsport to St. John, and even though (P. br. 16-17) Government statistics received in a congressional hearing appear to contradict his claim that his company has been required, in connection with sales to the Philippines, to "absorb" the amount of the Conference surcharge applicable at Manila.

Like the Commission, the Government's attorneys completely ignore the evidence which the Conference produced on short notice, which negates any claim of disadvantage or cargo diversion from the Port of Searsport. Paragraph 4 of the affidavit of Mr. James A. Dennean, the late Chairman of the Far East Conference, submitted in response to the Commission's order to show cause, was as follows (JA 57-59):

"4. In the regular course of Conference business, statistics are kept on an annual and monthly basis for the carryings of the member lines of each commodity in the tariff from the Atlantic coast and Gulf coast to the countries of destination in the Far East. From those statistics I have excerpted the carryings of the member lines of newsprint paper to the Philippine Islands for the years 1961 to 1964 and

for the months January through May of 1965 as follows:

	1961 — Atlantic — Gulf	9,192 5,126	Total	14,318
	1962 — Atlantic — Gulf	6,044 1,855	Total	7,899
	1963 — Atlantic — Gulf	6,933 119	Total	7,052
	1964 — Atlantic — Gulf	7,105 62	Total	7,167
Jan. thru May	— Atlantic 1965 — Gulf	1,033	Total	1,033

"I attribute the notable decrease in carryings during the first five (5) months of 1965 to the longshoremen's strike which affected the entire Atlantic and Gulf coasts during January and February of this year. As will appear in paragraph 5 below, the same tendency in carryings for the first five (5) months of this year is reflected in total carryings of the member lines."

Annexed to Mr. Dennean's affidavit was an Exhibit A, as follows (JA 61):

COMPILATION OF CONFERENCE LINES SAILINGS AND CARGO LIFTED AT SEARSPORT, MAINE

			Newsprint Lifted—Tons		Other Cargo Lifted—Tons					
Year	Number of Lines Calling	Number of Vessel Sailings	P. 1.	All Other F.E.C. Areas	Total	P. I.	All Other F.E.C. Areas	Total	Total All Cargo Lifted	
1961	4	17	8,814	429	9,243	_	-	_	9,243	O1
1962	4	11	2,554	1,378	3,932				3,932	
1963	4	16	6,113	2,007	8,120	25		25	8,145	
1964	7	19	3,943	11,527	15,470	94	_	94	15,564	
1965	5	8	2,057	4,793	6,850			_	6,850	

From the foregoing figures, it seems clear that the Conference surcharge cannot be said to have caused any falling off in the export of U.S. newsprint, either from United States Atlantic ports generally, or from Searsport. During 1964—the first full year of the application of the surcharge, which became effective in October of 1963more newsprint was exported from United States Atlantic ports than had moved during either 1962 or 1963. By way of contrast, total Atlantic and Gulf exports of newsprint to the Philippines dropped by nearly 50% from 1961 to 1962, at which time there was no question of the application of any surcharge. It seems obvious that there are economic factors influencing the sales of U.S. newsprint to the Philippines other than ocean freight rates or surcharges. The bobtailed procedure which the respondents still seek to justify, allowed no opportunity to explore these serious questions underlying any charge of unlawful discrimination in the depth required in order to make a truly informed and expert finding.

The figures pertaining to Searsport alone are equally contrary to any holding of disadvantage to that Port by reason of freight rates or surcharges. During 1964, the first full year of the surcharge, more Conference vessels called at Searsport than during any previous year since 1961. More newsprint was lifted at Searsport for the Philippines than was lifted during 1962 when no surcharge was applicable. From 1961 to 1962, the carryings of newsprint fell from nearly 9,000 tons to 2,500 tons.

It hardly becomes the expert administrators to ignore the few facts which they permit the regulated parties to submit to them. B. Respondents Have Not Succeeded in Evading the Legal Doctrines Applicable to Unlawful Discrimination.

Apparently recognizing the futility of a frontal assault on Texas & Pacific Ry. Co. v. United States, 289 U.S. 627 (1933), respondents (R. br. 9-12) attempt to outflank it. This they seek to do by pointing out that Texas & Pacific was decided with reference to the specific powers of the Interstate Commerce Commission under §3 of the Interstate Commerce Act, 24 Stat. 379, as amended (49 U.S.C. §3), to deal with unjust and undue discriminations, preferences and prejudices. By way of contrast, §15 of the Shipping Act, as amended, 75 Stat. 763 (46 U.S.C. §814), which the Maritime Commission claims as the basis for its authority in the present proceeding, authorizes disapproval of agreements not only if they are found to be unjustly discriminatory, but also if they are found "to operate to the detriment of the commerce of the United States, or to be contrary to the public interest." Since the Commission has found that the Far East Conference Agreement, by reason of the application of the Manila surcharge to newsprint cargo from Searsport, operates to the detriment of the commerce of the United States and is contrary to the public interest, respondents say, Texas & Pacific Ry. may be ignored.

The fatal defect in this argument is that all of the Commission's conclusory "findings"—not only that the Conference has unjustly discriminated against Searsport, but also that the Conference Agreement operates to the detriment of United States commerce and is contrary to the public interest—are predicated on a single factual proposition, namely, that the Conference assesses a surcharge on Manila-bound cargo loaded at Searsport, whereas carriers serving St. John, outside the scope of the Conference

Agreement and tariff, do not assess a surcharge on Manilabound cargo. So much is clear from the Commission's report (JA 127) and from the Government's brief itself (R. br. 10, 11, 12). This is so notwithstanding the incomprehensible statement (R. br. 11-21) that the order under review is based, "not on a finding that the rates are discriminatory—but on a finding under section 15 that the Conference agreement is discriminatory", and that the Commission has solved the problem by freeing the Conference members from the obligation to observe a jointly established rate. This passage is obviously internally contradictory and it flies in the face of the entire rationale of the Commission's decision, namely, that there is a difference between the Conference's rate at Searsport and the rate that some other people are charging from St. John.

The entire case boils down to a question of a difference between two rates. That the Commission, in addition to labeling this differential as unjustly discriminatory, has characterized it as detrimental to United States commerce and contrary to the public interest, does not in any way weaken the applicability of the proposition that a ratemaking authority cannot be held responsible for the consequences of a differential between one rate which it does control, and another rate which it does not control and in the making of which it has no participation whatsoever. Texas & Pacific Ry. is fully applicable no matter what epithets the Commission or its attorneys use in describing the difference between the Conference rate from Searsport to Manila and the rates charged by carriers from St. John to Manila.

II. Respondents have not justified the denial to the petitioners of an evidentiary hearing.

While respondents have sought to justify the employment by the Commission of a bobtailed procedure which denied to the petitioners an evidentiary hearing as a predicate to possible agency action, their brief perpetuates the unfairness and prejudgment which characterized the proceedings under review. Respondents (R. br. 15) mention the magnanimity of the Commission which "permitted petitioners to file affidavits" and "allowed" petitioners to make oral argument. However, the true flavor of the Commission's approach appears in such statements as, "The facts relied upon by the Commission are indisputable at this stage. Nothing more could be disclosed about the facts that the Commission has relied upon." (R. br. 15.) Again, respondents state, "The Commission's order to show cause was an appropriate means of instituting the proceeding. The Commission properly utilized facts which constituted findings in the Commission's Docket No. 1155, in addition to other incontrovertible facts. * * * Therefore, the order to show cause was an appropriate device where the facts relied upon and alluded to in the order were incontrovertible." (R. br. 7.)

It thus appears that the Commission made its findings before it ever granted any hearing whatsoever. The privilege accorded to the petitioners on very short notice to submit affidavits was window dressing for a proceeding which was headed toward a foregone conclusion. Nor do respondents concede, as they ought to do, that the proceeding before the Commission accorded to petitioners no right even to submit affidavits to rebut the affidavits (in fact, only one was used) which the Commission's own counsel might submit.

Respondents offer American Export & Isbrandtsen L. v. Federal Maritime Com'n., 334 F. 2d 185 (9th Cir. 1964), as authority for the procedural validity of the Commission's action. That case did uphold the Commission's use of the order to show cause procedure—but on the basis of the circumstances peculiar to the Commission proceeding there under review. The circumstances to which we refer are (a) that the question raised by the Commission was whether action admittedly taken by the Pacific Coast European Conference was outside the scope of its approved conference agreement (334 F. 2d at 190); (b) that only four days before the expiration of its opportunity to file memoranda and affidavits, the conference there instead filed with the Commission a motion to dismiss the proceedings (id. at 191); and (c) that the conference there did not avail itself of the opportunity afforded in the order to show cause to appear and argue orally before the Commission either with respect to its motion to dismiss or with respect to the points raised by the order to show cause (id. at 191).

It was against this background that the court stated (id. at 193):

"* * Petitioners did nothing except to file, on April 26, 1963, a motion to dismiss the proceedings on the sole ground that the Commission was without statutory authority to adopt the order to show cause procedure. They deliberately and advisedly elected to rest their entire case on their motion to dismiss. In these circumstances they are in no position to complain of the lawful, authorized procedure which the Commission followed. The petitioners were promptly notified of the order denying the motion to dismiss and the reasons therefor, which notice was in compliance with the provisions of Section 6(d) of the Administrative Procedure Act [5 U.S.C. § 1005]." (Emphasis added.)

Further, the court stated (id. at 194):

"• • • The petitioners did not, in their motion to dismiss—which was the only document filed by them with the Commission—apprise the Commission of any fact stated in the order to show cause which petitioners disputed. Petitioners were notified in the order to show cause of their right to file affidavits and memorandum of law. They did not avail themselves of that opportunity to call to the attention of the Commission any facts which they disputed or which they believed to be relevant and material. Neither did they seek from the Commission any permission to submit evidence or to secure further time in which to submit the same."

Following the foregoing quotation, the court set forth five facts set forth in the order to show cause in that case as to which there was no issue.

By way of contrast, the present proceeding involved hotly disputed issues of fact, including the questions (a) whether there had been any diversion of cargo from Searsport to St. John except one shipment, which apparently turned out to be a test shipment which convinced Great Northern Paper Co. that it was better off adhering to its policy of shipping through Searsport; (b) whether Great Northern had, in fact, absorbed the surcharge on its shipments of newsprint from Searsport to Manila; (c) whether Great Northern had, in fact, suffered loss of business as the proximate result of the Conference surcharge; and (d) whether there is, in fact, such a similarity of transportation conditions between Searsport and St. John that, other things being equal, a disparity of rates in those trades would legally constitute rate discrimination.

We did not wait until the review proceedings to inform the Commission that these complex economic issues were raised by its order to show cause; that the Commission unlawfully placed upon the Conference the burden of proof on these issues; and that, in any event, the Conference could not, on the short notice allowed in the order to show cause, and by way of affidavits, produce evidence on the economic facts which the Commission's own decisions have stated are crucial in a case where unlawful discrimination is charged. All these positions were set forth in the memorandum which was filed for the Conference in response to the order to show cause (JA 39-43; 49-51). At the oral argument before the Commission, Conference counsel further explained the need for evidentiary hearings at which the opportunity would be presented to cross-examine the author of the affidavit submitted by the Commission's counsel (JA 92-93; 99-102; 119-121).

It cannot be stated that the petitioners here have not, at every stage of the proceeding, advanced the factual propositions with respect to which they desired and were entitled to a full hearing.

The Government (R. br. 14) suggests that petitioners, having participated in Docket No. 1155 in which it was held that Maersk Line and Pacific Star Line were discriminating in favor of St. John and against Searsport and the Great Northern Paper Co., are now estopped from questioning the factual postulates for that holding. They ignore the point made in our main brief (P. br. 35). Although the Commission held in Docket No. 1155 that Maersk Line had committed unjust discrimination, it also held that the Far East Conference, collectively (the petitioners here and the respondents in the order to show cause proceeding), had violated no provision of the Shipping Act. Maersk Line did not see fit to challenge the holding of unjust discrimination and conducted itself so as not to violate the order in Docket No. 1155. The Conference, having won its case before the Commission in Docket No. 1155, could not have obtained review of the holding of unjust discrimination since it was not a "party aggrieved" by the Docket No. 1155 order. If, under these circumstances, the Conference is precluded from having a full hearing upon a new charge of unjust discrimination leveled against it, then the law has created a trap from which even the wary cannot escape. The law does not deal so unfairly with litigants.

Viewed in the proper context, American Export & Isbrandtsen L. v. Federal Maritime Com'n, supra, merely held that, under the particular circumstances present in that case, the order to show cause procedure employed by the Commission had not deprived the conference there involved of any of its fundamental rights. The case does not uphold the Commission's order to show cause procedure as employed in the circumstances presently under consideration.

III. Respondents perpetuate the Commission's misinterpretation of Federal Maritime Commission v. Maersk Line.

The Commission (JA 127) has treated Federal Maritime Commission v. Maersk Line, 243 F. Supp. 561 (S.D.N.Y. 1965), as a judicial invitation to the Commission to do what it has done in the proceeding here under review. In their brief (R. br. 4), respondents treat that case as having held that Maersk could not comply with the Commission's order in Docket No. 1155 because three motions, made by Maersk in Far East Conference meetings, to eliminate the Manila surcharge on Searsport cargo failed to carry. The opinion in Maersk Line does not stand for either proposition.

The Court stated (243 F. Supp. at 562):

"While several grounds have been asserted by Maersk in opposition to this motion for an injunction, the only one that needs consideration is whether Maersk has violated the Commission's order so as to confer jurisdiction upon the court pursuant to 46 U.S.C. §828."

The court thus made it plain that it was deciding only a single question, namely, whether Maersk had violated the order in Docket No. 1155. On this point the court, after referring to the record before it and particularly the fact that, since the date of the Docket No. 1155 order, Maersk had not assessed or sought to assess at Searsport the Manila surcharge set forth in the Far East Conference tariff, stated (id. at 563):

"* * Moreover, Maersk cannot be charged with a violation unless and until it assesses the surcharge on shipments of newsprint from Searsport, Maine to Manila. * * *

"Since no violation of the Commission's order of February 3, 1965 is found, the application of the Commission for an injunction pursuant to §29 of the Shipping Act, 1916 (46 U.S.C. §828) is denied."

This was all the District Court said that was pertinent to its holding.

Insofar as the court referred (id. at 563) to the statutory obligation of Maersk as a Conference member to adhere to the Conference tariff, it was correct, but not, apparently, cognizant of Maersk's freedom to comply with the Docket No. 1155 order in a number of ways, including resignation from the Conference, cessation of service from St. John to Manila, or application of a surcharge to Manila-bound cargo loaded at St. John. Any of these courses could have been pursued without violation of the

Conference tariff or of §18(b)(3) of the Shipping Act, 1916, as amended, 75 Stat. 765 (46 U.S.C. §817(b)(3)).

However, the most serious misinterpretation of Maersk Line lies in the Commission's reading of the following passage in the opinion (243 F. Supp. at 563):

"If the Commission believes that the Conference surcharge approved in the proceeding above mentioned is now unreasonable, it is free to reopen the proceeding and, if it so finds, to direct the Conference to remove the surcharge. Indeed, if the Commission believes that the difference in rate between Searsport, Maine and east Canadian ports caused by the surcharge results in discrimination to United States shippers and to the port of Searsport, this would appear to be an appropriate procedure to follow. ••"

It is clear that the Court contemplated the reopening of Docket No. 1155 for the taking of further evidence which would be considered in determining whether a finding could be made which would support condemnation of the recently approved surcharge. It obviously did not contemplate the institution of a new proceeding in which the Commission's preconceptions would be treated as "incontrovertible facts" and in which all other facts would be ignored while the Commission proceeded to a prejudged conclusion.

IV. Miscellaneous.

Respondents (R. br. 21) refer to our argument that compliance with the order under review would produce discriminations against United States Atlantic and Gulf ports other than Searsport, and state that it is "pure hypothesis" and that, "There is absolutely no basis in the record to justify this fear."

In our principal brief (P. br. 39-40), we pointed out the facts in the record which support the probability that such discrimination would be produced. That we do not stand alone as partisan advocates in so viewing the record is demonstrated by the following passage quoted from the dissenting opinion of Commissioner Hear, in which Commissioner Patterson concurred (JA 14.):

"• • • The majority action here is official Commission approval of a discrimination against shippers of newsprint from any other port [than Searsport] and of an undue tariff burden against shippers of all commodities from all ports within the conference range."

Next, we advert to the matter of the Commission's power—or lack thereof—over the rates of ocean carriers in the foreign commerce of the United States. We understand that this subject is fully treated in the brief amici curiae. We will not duplicate what is said there on behalf of conferences which are concerned over the industry-wide implications of the Commission's effort to overstep its authority. We do wish to emphasize that the Commission appears (JA 135-137) to have asserted the right to use §15, relating to ocean carrier agreements, as a method of extorting from conference carriers subservience to a degree of rate control which has never been conferred upon the Commission.

Respondents acknowledge (R. br. 18-19) that a direct effort by the Commission to order the elimination of the surcharge would have run up against the claim that its action was confiscatory. This would inevitably follow from the earlier holding in Docket No. 1155 that the surcharge was entirely justified on account of extra costs incurred in calling at Manila for the discharge of cargo. However, respondents argue that the Commission may with impunity coerce the same result by threatening to

force the conference lines into open competition. One of the impelling purposes of Congress in authorizing the approval of conference agreements was to eliminate cutthroat competition with its attendant impulse toward discontinuance or consolidation of services. See, H.R. Doc. No. 805, 63rd Cong., 2d Sess. (1914) 416, et seq. It thus appears that the Commission's action here is directly contrary to the policy contemplated by the authors of the Shipping Act.

Finally, we come to the matter of the Commission's interpretation of so much of the second paragraph of §15 of the Shipping Act, 1916, as amended, 75 Stat. 763 (46 U.S.C. §814), as directs the Commission to disapprove an agreement which it finds "to be contrary to the public interest" and to "approve all other agreements". In reaching its conclusion in the present proceedings, the Commission stated (JA 133):

making conferences for private commercial reasons, in exchange for this privilege we insist that these arrangements contribute in some manner toward public interest. As we said in *Pacific Coast European Conference*, 7 F.M.C. 27, 37 (1961):

'A conference agreement is not some sacrosanct private arrangement but a public contract, impressed with the public interest and permitted to exist only so long as it serves that interest.'

Thus, instead of recognizing that §15 requires approval unless the Commission can make a finding supported by evidence that the agreement is "contrary to the public interest", the Commission has sought to rewrite §15 so that it would require disapproval unless the finding can be made that it affirmatively contributes to the public interest. Only Congress, and not the Commission, may completely reverse the thrust of the law which gives the

Commission its powers and the standards for their exercise.

The amici curiae have thoroughly covered this point at pp. 19-22 of their brief, and in particular the explicit determination in connection with the 1961 amendment to the Shipping Act that the requirement of §15 should be for approval unless an adverse finding is made, and not for disapproval unless a favorable finding is made. We respectfully refer the Court to the brief amici curiae rather than duplicating what is there said.

As we have pointed out, supra at pp. 7-8, the language in the Commission's report regarding detriment to commerce and conflict with the public interest has no independent stature in this case. The sole basis for these purported findings rests on the disparity between the rates to Manila from Searsport and St. John. In order to hold that this disparity amounts to an unlawful discrimination, the Commission would have to find disadvantage to one port and one shipper as compared with another port and another shipper. Since, as we have shown, petitioners cannot be held responsible for the disparity, they cannot be said to have acted to the detriment of United States commerce or contrary to public interest.

CONCLUSION

Respondents in their brief have not shown why the arguments in our principal brief should not prevail and, accordingly, the relief sought in the petition for review should be granted.

Respectfully submitted,

New York, N.Y. March 29, 1966.

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IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 19,790

FAR EAST CONFERENCE, et al.,

Petitioners,

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF ORDER OF THE FEDERAL MARITIME COMMISSION

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March 14, 1966 Washington, D. C. United States Court of Appeals for the District of Columbia Circuit

FHED APR 8 1966

Nathan & Paulson

QUESTIONS PRESENTED

In Docket No. 65-29, Imposition of Surcharge by the Far East Confer-12 ence at Searsport, Maine, the Federal Maritime Commission found that the Far East Conference agreement and the conference tariff, by requiring the assessment of a surcharge at Searsport, Maine, on newsprint moving to Manila, Republic of the Philippines, has operated in a manner which is unjustly discriminatory and unfair as between ports and between exporters from the United States and their foreign competitors, detrimental to these commerce of the United States, and contrary to the public interest contrary to the requirements of section 15 of the Shipping Act, 1916 (46 U.S.C. 814). Based upon this finding the Commission ordered the Far East Conference to open the rate on newsprint loaded at Searsport, Maine, and destined to Manila, Republic of the Philippines.

The questions presented are:

1. Having found that the Far East Conference Agreement was operating in a manner which was unjustly discriminatory between ports, unjustly discriminatory and unfair as between exporters from the United States and their foreign competitors, detrimental to the commerce of the United States, and contrary to the public interest, due to the continuation of a surcharge on the carriage of newsprint from Searsport, Maine, and the refusal of the Conference to remove the surcharge, was not the Federal Maritime Commission authorized and indeed required to order the Conference

to open its rate on newsprint from Searsport, or, in the alternative, order the port of Searsport deleted from the Conference range of ports?

2. Was not the Conference accorded a fair hearing previous to the issuance of the report and order under review, when it already had a full opportunity to contest the facts utilized by the Commission, had adequate notice of the Commission's order to show cause, had an oportunity to submit further affidavits of fact and memoranda of law, and had an opportunity for oral argument?

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COUNTERSTATEMENT OF THE CASE

The present proceeding is a result of a petition of the Far East Conference challenging a final order of the Federal Maritime Commission in F.M.C. Docket No. 65-29. The order, in effect, would require the Far East Conference and its members, who normally set rates collectively within the framework of the conference, to set rates individually and independently upon newsprint moving from Searsport, Maine, to Manila, Republic of the Philippines.

Docket No. 65-29 was the outgrowth of an earlier Federal Maritime

Commission investigation, Imposition of Surcharge on Cargo to Manila, Republic of the Philippines, F.M.C. Docket No. 1155 (February 3, 1965).

The Commission had instituted Docket No. 1155 to investigate the lawfulness of surcharges on cargo moving from ports in the United States to Manila,

Republic of the Philippines. Its purpose was to determine whether the surcharges were contrary to sections 15, 16, 17, and 18(b)(5) of the Shipping

Act, 1916 (46 U.S.C. 814, 815, 816, 817(b)(5)).

The Far East Conference on July 25, 1963, filed with the Commission surcharges of \$10 per ton, as freighted, on cargoes destined for discharge at Manila, to be effective October 28, 1963. The amount of the surcharge has fluctuated since, but a surcharge was effective at Manila at the time of hearing and is scheduled to be increased from \$5 to \$10 per ton on April 1, 1966.

As far as is pertinent here, the Commission named as respondents in Docket No. 1155 the Far East Conference and its member lines. The Far

East Conference serves Manila from United States Atlantic and Gulf ports, but this range of service does not include Canadian Atlantic ports. Maersk Line, however, a Far East Conference member, serves Canada to Manila as an independent.

In Docket No. 1155 the Commission held that carriers operating from United States ports to Manila were justified in imposing a surcharge on cargo unloaded at the Port of Manila, because of the extraordinary delays caused by labor difficulties and port congestion. Nevertheless, the Commission found that Maersk Line, by imposing a surcharge on newsprint at Searsport, Maine, while not applying a surcharge at St. John, New Brunswick, Canada, demanded, charged, and collected a charge which is unjustly discriminatory between shippers and ports and unjustly prejudicial to exporters of the United States as compared with their foreign competitors contrary to section 17 of the Shipping Act, 1916 (46 U.S.C. 816).

In its opinion in Docket No. 1155, the Commission stated:

The Great Northern Paper Company is an exporter of paper and newsprint, competing with Canadian mills for the Philippine market. It has traditionally shipped its products from Searsport, Maine, where the surcharge is applicable. Canadian competitors, shipping from Eastern Canada, pay no surcharge in the Philippine trade. Newsprint is a low-rated commodity with a small margin of profit. During the first nine months of 1963, Great Northern shipped about 700 tons of newsprint a month but none was shipped in November and December. Since Great Northern can avoid the surcharge by utilizing Canadian ports and thus maintain a competitive position in the Philippines, it has embarked on a program of diverting newsprint from Searsport, Maine, and has now begun to export from the Canadian port of St. John. This diversion to Canada is

not without some expense to Great Northern, and it deplores the inability of Searsport to handle this cargo. Great Northern's business is so competitive in the Philippines that it has not been able to pass on the entire surcharge to its customers, and it lost sales totaling about 1400 tons of paper in November and December 1963 that were made by Eastern Canadian mills.

These facts establish that Pacific Star Line and Maersk Line, by assessing a surcharge on newsprint at Searsport, Maine, while not at Canadian Atlantic ports, have unjustly discriminated against Great Northern and the port of Searsport while advantaging Canadian shippers of newsprint and the port of St. John. We find that a sufficient competitive relationship exists between the shippers and ports concerned; we find that Great Northern and the Port of Searsport have suffered pecuniary harm by the imposition of the surcharge and the resultant diversion of traffic, and we find that the transportation conditions are similar from St. John and Searsport. Pacific Star and Maersk, therefore, have demanded, charged, and collected a charge which is unreasonable. We find this conduct to be contrary to the provisions of section 17, which provides that "no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors." West Indies Fruit Co. v. Flota Mercante 27 F.M.C. 66 (1962)/. Grays Harbor Pulp & Paper Co. v. A.F. Klaveness & Co., A/S, 2 U.S.M.C. 366, 369 (1940). We will order these carriers to cease and desist from this unreasonable practice by removing the inequality of treatment between shippers and ports by appropriate tariff amendments. (JA 10-12)

To implement this holding, the Commission ordered Maersk to cease and desist from charging discriminatory rates on newsprint moving from Searsport to Manila. Maersk was required to notify the Commission within 15 days of the date of the order of the manner in which Maersk would eliminate the prejudice and discrimination.

Thereafter, Maersk requested an extension of time to comply. The Commission denied the petition and noted:

Nor, can their pleas /Maersk's/ that compliance is difficult in light of their obligations as members of the Far East Conference and as parties to Agreement No. 8200 with the Pacific Westbound Conference alter our rejection of this request for enlargement. Maersk Line is directed to end the discrimination set out in our opinion. No obligation of a conference member can delay the elimination of action which is contrary to a statute of the United States. Conferences, which exist pursuant to our section 15 approval, must not only cooperate fully to eliminate discrimination but, indeed, we expect them to take the lead to such end. (JA 126-127)

Believing that Maersk had failed to comply with its order, the Commission applied to the United States District Court for the Southern District of New York for an order to show cause why an order should not be made by the District Court pursuant to section 29 of the Shipping Act (46 U.S.C. 828) to enforce obedience by Maersk to the Commission's order of February 3, 1965. In subsequently ruling upon that order to show cause, the District Court on July 12, 1965, refused to enter an injunction against Maersk on two grounds: (1) that Maersk was not serving Searsport and, therefore, it was not necessary that it change a rate applicable at that port, and (2) that Maersk could not comply with the order because, despite its efforts on three separate occasions to have the Conference eliminate the Searsport surcharge, the Conference each time refused to make the change. Federal Maritime Commission v. Maersk Line, 243 F. Supp. 561 (S.D.N.Y. 1965).

The Commission thereupon instituted Docket No. 65-29, <u>Imposition of</u>
Surcharge by the Far East Conference at Searsport, <u>Maine</u>, the final order

of which is under review here. After reciting the background facts described above, the Commission directed the Conference to show cause why its organic agreement (F.M.C. Agreement No. 17) should not be amended to remove the Port of Searsport from the trading range of the Conference, "because the applicable tariffs of the Conference result in a situation which is detrimental to the commerce of the United States, contrary to the public interest, and otherwise in violation of the Shipping Act."

After service of the order to show cause, the Conference filed a memorandum in which it argued that there was no showing (rather the Commission's finding in Docket No. 1155 was to the contrary) that the Conference had violated section 15 in any respect and that as a matter of law the Conference cannot be held to have violated section 17. In addition, the Conference contended that the entire proceeding was procedurally defective because it denied the conference the opportunity for cross-examination, it failed to give it adequate notice of the matters of fact and law to be asserted, it misplaced the burden of proof, and the proceeding was "conceived in vindictiveness and dedicated to harassment."

Attached to the memorandum was an affidavit which predicted dire consequences to be expected from attempts to tamper with the range of ports served by the conference. (JA 56-60)

^{1/} The Commission's order further directed that the proceeding be limited to the submission of affidavits and memoranda, replies thereto, and oral argument. (JA 33)

The Commission's Hearing Counsel filed a reply memorandum opposing the arguments of the Conference. Hearing Counsel also submitted an affidavit of Joseph Carena of Great Northern updating his testimony in Docket No. 1155, which indicated that assessment of a surcharge at Searsport on shipments of newsprint while none was assessed at St. John continued to have an adverse effect on sales in the Philippines. (JA 81-85)

On September 16, 1965, the Commission held oral argument; on November 5, 1965, the Commission served its report in Docket No. 65-29, ordering the Conference to "open" the rate on newsprint loaded at Searsport, for Manila. The Commission found that Searsport continued to be at a disadvantage vis-a-vis St. John and that exporters of newsprint using Searsport or desiring to use that port were at a competitive disadvantage as compared with Canadian exporters. The Commission further found that it was the Conference agreement which aggravated this situation.

The Commission made the following ultimate findings:

We hold that the Far East Conference agreement me has operated in a manner which is unjustly discriminatory or unfair as between ports and between exporters from the United States and their foreign competitors. In addition, we find that the agreement has operated in a manner which is detrimental to the commerce of the United States and contrary to the public interest. (JA 128-129)

The Commission thereupon ordered the Conference rate "open" on newsprint moving from Searsport to Manila. (JA 148)

SUMMARY OF ARGUMENT

that a surcharge was assessed on newsprint at Searsport while none was assessed at the neighboring port of St. John. These ports are competitive and the transportations conditions are similar, and Searsport has lost traffic due to the imposition of the surcharge. In addition, an American exporter of newsprint is at a competitive disadvantage compared with its Canadian competitors because of the surcharge. The Conference due to its refusal to abolish or reduce the surcharge is the cause of this harmful rate differential, and consequently, the Commission found that the Conference's agreement was being carried out in violation of section 15. Having made these findings, the Commission was authorized and required to take action to protect American ports and American exporters.

II. The Commission's order to show cause was an appropriate means of instituting the proceeding. The Commission properly utilized facts which constituted findings in the Commission's Docket No. 1155, in addition to other incontrovertible facts. As the order to show cause recited, these facts indicated that it appeared that the Conference agreement was operating in a manner harmful to an American port and to an American exporter. Therefore the order to show cause was an appropriate device where the facts relied upon and alluded to in the order were incontrovertible. Furthermore, the Conference was given the opportunity to submit affidavits and to argue orally before the Commission. Under these circumstances, petitioners were accorded an adequate opportunity to be heard.

open rates at Searsport on newsprint moving to Manila was designed to eliminate discrimination by restoring natural competition between Searsport and St. John, and there is no basis for petitioners' assertion that the order would create more discrimination that it would eliminate.

ARGUMENT

I. THE COMMISSION'S ORDER IS BASED UPON FINDINGS SUPPORTED BY EVIDENCE OF RECORD AND IN HARMONY WITH THE COMMISSION'S RESPONSIBILITY UNDER SECTION 15.

The basic fact in this case is this: There is a surcharge at Searsport, Maine; there is no surcharge at St. John, Canada. This difference in rates to Manila has caused harm to Searsport and to a company normally shipping from that port. The Commission has found that Searsport and St. John are competitive and have similar transportation conditions, and that Searsport has lost traffic because of the surcharge. It has also found that the Great Northern Paper Company is at a competitive disadvantage with its Canadian competitors because of the surcharge. It has found that one Conference carrier, Maersk, attempted three times to have the Conference remove the surcharge from Searsport. The Conference each time refused to do so. Thus, the Conference is the cause of the surcharge remaining in force at Searsport.

On the basis of these findings, the Commission concluded that the Conference agreement which compels member lines to charge rates set by the Conference was subject to modification under section 15 of the Shipping Act. It made four separate ultimate findings under section 15: (1) that the Conference agreement was unjustly discriminatory or unfair as between ports; (2) that it was unjustly discriminatory or unfair between an exporter from the United States and its foreign competitors; (3) that it operated to the detriment of the commerce of the United States; and (4) that it was contrary to the public interest. The Commission thereupon opened the rate on newsprint.

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The petitioners incorrectly assume that the Commission's conclusions rest upon the premise that Maersk still discriminates against Searsport. They contend that, since Maersk no longer serves Searsport and since the court in Federal Maritime Commission v. Maersk Line, 243 F. Supp. 561 (S.D.N.Y., 1965) found that Maersk was not violating the Commission's order, the Conference could not be a cause of a discrimination which does not exist. But the Commission did not base its order on a discrimination by Maersk but rather on the difference in rates which remains regardless of what Maersk decides to do. "A surcharge is still imposed at Searsport and no surcharge is imposed at St. John. The fact that Maersk does not serve both ports does not obviate this discrimination." (JA 127)

The petitioners erroneously contend that as a matter of law the Conference could not have discriminated between ports and between shippers because the Conference does not control the rates at both ports, citing Texas & Pacific Ry. Co. v. United States, 289 U.S. 627 (1933) (Brief, pp. 18-25). While we will contend that the rule in Texas & Pacific does not apply to the Commission's findings of discrimination, we should like first to point out that the Commission found not only that the agreement worked in such a way to discriminate between ports and shippers, but also that the agreement operated to the detriment of the commerce of the United States and was contrary to the public interest. Any one of these findings would be enough to warrant remedial action under section 15. Nothing comparable to the Commission's findings as to detriment to commerce and to the public interest was considered by the Supreme Court in Texas Pacific,

a case involving a finding of discrimination under section 3(1) of the Interstate Commerce Act. Congress has unequivocally given the Maritime Commission the authority to judge shipping agreements by other standards, and the Commission has done so by finding the agreement—a cause of a harmful rate differential—detrimental to commerce and contrary to the public interest. To apply the Texas & Pacific rule to these findings would be to render the Commission powerless to protect American interests merely because the trading range of the petitioner Conference does not include Canada. Congress could not have intended to give the Commission such frail instruments to protect American commerce and the public interest.

The rule of the <u>Texas & Pacific</u> case does not in any event apply to the Commission's finding even as to unjust discrimination. There is an important distinction between the facts in the two cases. In <u>Texas & Pacific</u>, the Interstate Commerce Commission had found that <u>rates</u> were discriminatory between two ports. The court's relevant holding was that there could be no finding of discrimination unless the railroad controlled the rates to both ports, 289 U.S. 627, 649. The court based this holding on the ground that the railroad must have a choice of remedies: "The offender or offenders may abate the discrimination by raising one rate, lowering the other, or altering both" <u>Id</u>. at 650. In the instant case, the effect of the Commission order is to empower each member line to control its rates. Here, the Commission based its order—<u>not</u> on a finding that the <u>rates</u> are discriminatory—but on a finding under section 15 that the <u>Conference agreement</u> is discriminatory and directed the Conference, not with respect to

rates, but with respect to the Conference agreement. By opening the rates, the Commission freed the member lines from the obligation imposed by the Conference agreement to fix the rates in concert, thus permitting each freely and competitively to set its own rate.

Petitioners contend that the Commission in Docket No. 65-29 actually repudiated its earlier holding in Docket No. 1155. But the fact is that the Commission did not compromise its earlier holding. In Docket No. 1155, the Commission held that, in general, the Conference was justified in assessing a 10 percent surcharge. In Docket No. 65-29, the Commission simply held that in this isolated situation the power of the Conference to control rates and its reluctance to make tariff changes on newsprint at Searsport worked out in the long run to be harmful to a localized segment of our commerce.

The Conference can hardly be said to have acted toward the common good of shippers and carriers nor to have attempted to promote commerce from a United States port, the purported purpose of the agreement.

A conference agreement is not some sacrosanct private arrangement but a public contract, impressed with the public interest and permitted to exist only so long as it serves that interest. Pacific Coast European Conference, 7 F.M.C. 27, 37 (1961)

Indeed, this court has espoused this position:

Because the 1958 Agreement /a section 15 agreement/ is not simply a private contract between private parties, the intent of the parties is only one relevant factor, and the . . . /Federal Maritime Commission/not only can, but must, weigh such considerations as the effect of the interpretation on commerce and the public. Swift & Company v. Federal Maritime Commission, 113 U.S. App. D.C. 117,121; 306 F. 2d 277, 281 (1962)

The Commission found that the Conference agreement operated in a manner proscribed by section 15. Having made these findings, the Commission was authorized and required to take steps to enforce the statutory protections of United States ports and United States exporters. The petitioner's contentions (Pet. Br. pp. 13-18) that the Commission's ultimate findings were based on erroneous factual conclusions are without merit. The Commission's. findings that Searsport and Great Northern were harmed by the rate differential were based on evidence indicating that Great Northern actually diverted one shipment from Searsport to St. John, in order to remain competitive, has absorbed part of the surcharge, and has lost business to its Canadian competitors (JA 132). Searsport is additionally harmed because Maersk no longer serves it (JA 130). "Such discriminations will not be set aside by courts if there is evidence to support them. Even though, upon a consideration of all the evidence, a court might reach a different conclusion, it is not authorized to substitute its own for the administrative judgment." Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 304 (1937).

II. THE COMMISSION'S ORDER TO SHOW CAUSE WAS AN APPROPRIATE MEANS OF INSTITUTING THE PROCEEDING AND PETITIONERS WERE DEPRIVED OF NO RIGHTS BY VIRTUE OF THIS PROCEDURE.

First of all the Commission's decision rests upon facts which were the findings of a previous adjudication in Docket No. 1155. These facts were derived from a full evidentiary hearing at which petitioners were present and participated fully in cross-examination and in presenting rebuttal testimony. Therefore, the Commission could take these facts into consideration in a subsequent proceeding in which related issues were presented and in which the same parties were involved. The Commission did not expand the facts found in Docket No. 1155 since the report in Docket No. 65-29 quotes those facts verbatim. The petitioners have not shown that they suffered any substantial prejudice from this proceeding and therefore have no cause for complaint. U.S. v. Pierce Auto Lines,

In addition to the facts derived from Docket No. 1155, the Commission made use of certain other facts. The Commission used the fact that Maersk Line had petitioned for an extension of time in Docket No. 1155, that the extension of time was denied, that the Commission sought enforcement of its order but was unable to obtain such enforcement, and that the Conference as disclosed in the minutes filed with the Commission had refused to delete the surcharge on newsprint at Searsport. The Commission utilized one other fact of a negative nature. That fact was that nothing had occurred subsequent to the order in Docket No. 1155 which changed the situation then prevailing.

It was manifestly unnecessary to subject these facts, which either already had been subjected to cross-examination or were indisputable, to the tests of a full evidentiary hearing. There simply was no need and the circumstances did not warrant a full-blown, dilatory hearing. Therefore, the argument of petitioners that the proceeding is procedurally defective is untenable. The Administrative Procedure Act does not require in every instance a full evidentiary hearing with full opportunity for cross-examination. The right of cross-examination should be granted where it is necessary for full disclosure of pertinent facts. Where cross-examination is not necessary for full disclosure, the opportunity is not afforded as a matter of right. Section 7(c) of the Administrative Procedure Act states:

Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

The facts relied upon by the Commission are indisputable at this stage.

Nothing more could be disclosed about the facts that the Commission has relied upon. Nevertheless, the Commission permitted petitioners to file affidavits which they did and petitioners were afforded a hearing in the sense that they were allowed to present their position orally to the Commission through argument. Petitioners, therefore, were given a fair hearing. They were given an opportunity to meet such facts which adversely affected their interests.

Petitioners have yet to make completely clear just what "facts" they could or would have established had they been granted the opportunity to adduce "evidence."

Petitioners also argue that the proceeding before the Commission was procedurally defective because they were not given notice of the matters of fact and law to be asserted.

A simple reading of the order clearly demonstrates that it was in' full compliance with all of the provisions of section 5(a) of the Administrative Procedure Act. Section 5(a) merely requires that the order contain (1) a reference to the agency's authority sufficient to inform the parties of the legal powers and jurisdiction which the agency is invoking in the particular case, thus enabling the parties to raise any legal issues they consider relevant and (2) a statement of the matters of fact and law asserted sufficient to advise the parties of the legal and factual issues involved in the proceeding. It is not required to set forth evidentiary facts or legal argument. Attorney General's Manual on the Administrative Procedure Act, pages 46, 47. We submit that it is abundantly clear from the order itself that the legal powers and jurisdiction invoked by the Commission were those vested in it by section 15 of the Shipping Act and

It is elementary that where no facts are in dispute there is no need for an evidentiary hearing. Davis Administrative Law Treatise, \$\$7.01, 7.18. As the Court said in Producers Livestock Marketing Ass'n v. U.S., 241 F.2d 192, 196 (10th Cir. 1957) affirmed sub. nom. Denver Stock Yard v. Livestock Ass'n 356 U.S. 282 (1958):

^{...} it is fundamental to the law that the submission of evidence is not required to characterize "a full hearing" where such evidence is immaterial to the issue to be decided. * * * Where no genuine or material issue of fact is presented, the court or the administrative body may pass upon the issues of law after according the parties the right of argument.

that all matters of fact and law asserted were stated with sufficient clarity to advise the parties of the issues involved.

Accordingly, the Commission satisfied the notice requirement of the Administrative Procedure Act in that it gave to the conference a general summary of the matters in issue.

the thrust of section 15 (Argument III in Petitioners' Brief). They rely upon that part of section 15 which provides that the Commission "shall approve all other agreements." The argument presumes that the Commission made no findings prerequisite to disapproval or modification of an agreement. Such is not the case. The Commission openly made the findings and supported them with adequate reasoning. Thus, the "shall approve all other agreements" is immaterial since the Commission had evidence and made findings. Moreover, the show cause procedure used by the Commission has been affirmed. See American Export & Isbrandtsen L. v. Federal Maritime Com'n, 334 F.2d 185 (9th Cir. 1964).

Finally the petitioners argue that they had no notice that the Commission intended to open the rate on newsprint at Searsport. The order to show cause directed the conference to show cause why Searsport should not be withdrawn from the approved trading range of the conference, i.e., why

^{3/} That decision supports the view that the Commission is not limited to findings made after a full-blown evidentiary hearing where such a hearing is unnecessary.

the port. This is only slightly different and if anything more drastic than opening the newsprint rate at Searsport. Obviously the entire problem dealt with newsprint. Therefore, the Commission's action in opening the newsprint rate at Searsport was not significantly different from its announced aim. As a practical matter the remedies are approximately the same, and arguments against the deletion of Searsport from the conference trading range are also applicable to arguments against opening the rate on newsprint. The order instituting a proceeding need not include a precise statement of the adverse consequences of agency action. The agency is required to notify and has notified petitioners of the matters of fact and law to be asserted. Petitioners, therefore, were given adequate notice.

III. BY ORDERING THE NEWSPRINT RATE FROM SEARSPORT TO MANILA OPEN,
THE COMMISSION ELIMINATED A MAJOR OBSTACLE TO NONDISCRIMINATORY
RATES.

In Docket No. 1155, the Commission found that the Port of Searsport had been harmed and that Great Northern, a shipper-exporter, had also been harmed. The Commission found in Docket No. 65-29 that this harm had not been obviated by Maersk's abandonment of service at Searsport. Accordingly, the Commission attempted to design a remedy appropriate to these circumstances.

Thus, in Docket No. 65-29 the Commission did not order that the surcharge rate be stricken from the tariff. The Commission was careful not to do so because of the danger of imposing upon conference members a rate which was potentially confiscatory. In the absence of cost figures disclosing what a lawful rate should be, the Commission could not specify a certain rate. But in an open rate situation, the conference members will be free to establish rates according to their business judgment, subject only to the antidiscrimination provisions of sections 16 and 17 of the Shipping Act and the unreasonably high or low requirements of section 18(b)(5). Therefore, the Commission did not act directly against the newsprint rate or the surcharge; it simply removed artificial restrictions which prevent carriers from treating the Port of Searsport fairly.

It is logical to assume that some of the conference members, by force of normal competitive pressures, would have, but for their obligations as conference members to abide by the conference's decision on rate matters, equalized rates between St. John and Searsport. This is apparent from the fact that on three occasions a motion was made and seconded to accomplish this result. At the very least, carriers would be free to establish rate parity but for obligations to adhere strictly to the conference tariff.

The failure to achieve nondiscriminatory rates in some measure is attributable to collective rate making. Consequently, the Commission decided that the most expedient means of achieving fairness of rates at Searsport would be to restore competition in rate making at that port. The Commission's decision was based upon a finding that the Conference

agreement had operated in a manner harmful to Searsport and upon the underlying knowledge that competition in ocean transportation is a consistent leveler.

The remedy which the Commission devised—to open the newsprint rate from Searsport to Manila—is authorized by law. Section 15 itself provides that the Commission may disapprove an agreement upon a finding that the agreement operates in a manner which is unjustly discriminatory between ports or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Similarly, the Commission may modify an agreement where the agreement operates in an unlawful manner. Indeed, the Commission has a duty to take such action in the face of such a finding. Pacific Far East Line v. United States, 101 U.S. App. D.C. 24, 246 F.2d 711 (1957).

In Empire State Highway Transp. Ass'n v. Federal Maritime Bd., 110 U.S. App. D.C. 208, 291 F.2d 336, 339 (1961), cert. den. 368 U.S. 931 (1961), the court summarized this authority as follows:

when a conference has engaged in conduct violative of the fair and reasonable standards of the Act the Board may withdraw approval of the basic agreement itself, or require its modification.

Therefore, the Commission has the power to take the action contemplated by the order to show cause that instituted the Commission proceeding; i.e., the Commission may modify the Far East Conference agreement to eliminate Searsport from the authorized trading range of the

Conference. Rather than follow this drastic course, the Commission took lesser action. In the Commission's view, it was more expedient to alter the rate structure developed under the basic agreement so the Commission declared the newsprint rate at Searsport "open." The Commission's order left the Conference's jurisdiction at Searsport intact, but it required carriers serving that port individually to set rates on newsprint moving to Manila. Since the Conference serves many destinations in addition to Manila, the Commission considered it desirable not to curtail the scope of the Conference agreement in any other respect.

Petitioners would have this Court believe that the order under review would create more discrimination than it would eliminate. Apparently they believe that compliance with the order would require them to discriminate against other areas where newsprint is shipped in favor of Searsport. This is pure hypothesis. There is absolutely no basis in the record to justify this fear.

CONCLUSION

For the foregoing reasons, the Commission's order under review should be affirmed.

Respectfully submitted,

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March 14, 1966 Washington, D. C. IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

FAR EAST CONFERENCE, et al.,

Petitioners.

against

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,

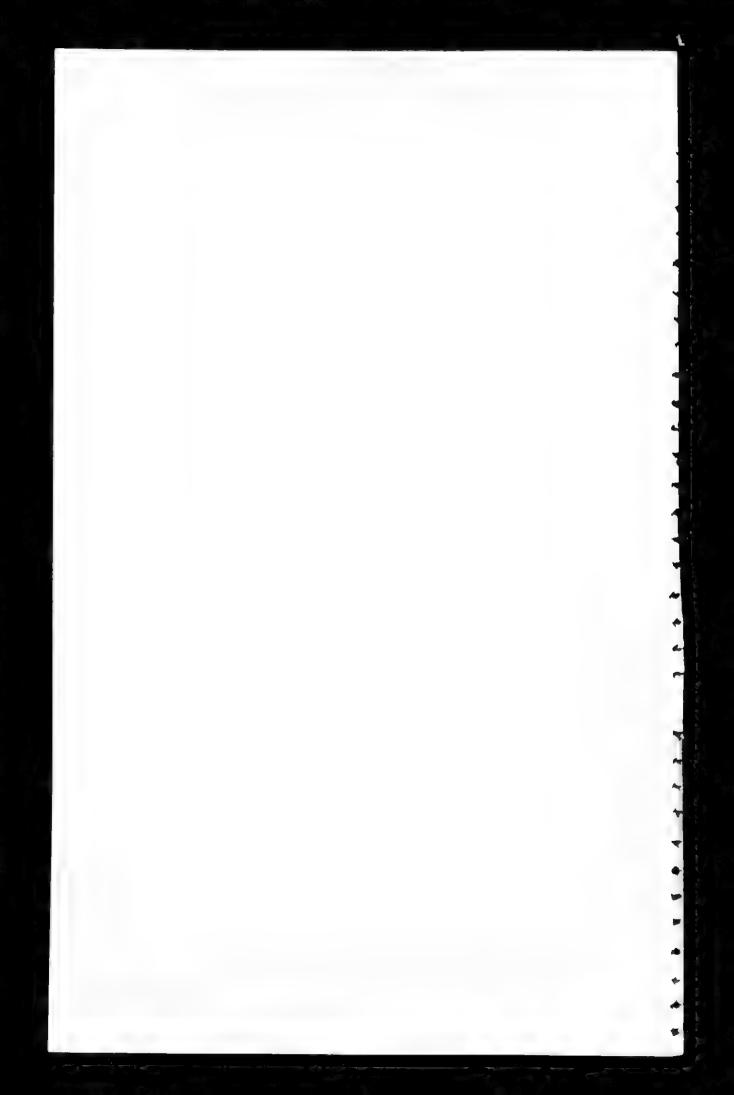
Respondents.

Case No. 19,790

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL MARITIME COMMISSION.

BRIEF AMICI CURIAE SUBMITTED ON BEHALF OF THE ASSOCIATED LATIN AMERICAN FREIGHT CONFERENCES AND THEIR MEMBER LINES LISTED IN APPENDIX A.

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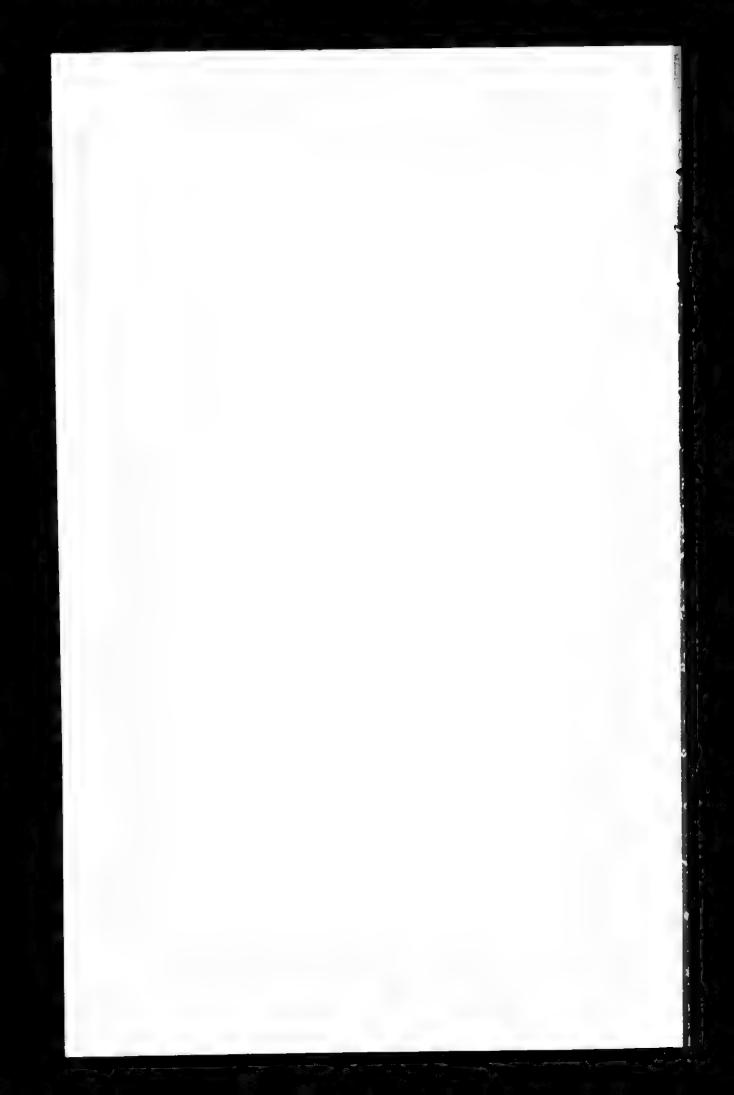
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

FAR EAST CONFERENCE, et al., Petitioners,

2.

Federal Maritime Commission and United States of America,
Repondents.

Case No. 19,790

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL MARITIME COMMISSION.

BRIEF AMICI CURIAE SUBMITTED ON BEHALF
OF THE ASSOCIATED LATIN AMERICAN
FREIGHT CONFERENCES AND THEIR MEMBER LINES LISTED IN APPENDIX A.

Statement of Interest.

This brief amici curiae is submitted on behalf of thirteen conferences and their twenty member lines operating between the Atlantic and Gulf Coast ports of the United States and ports throughout the Caribbean, the north coast of South America, and the west coast of South and Central America. The names of the applicant Conferences, the areas served, and a list of the member lines are set forth in Appendix A. These Conferences are collectively referred to as the Associated Latin American Freight Conferences ("ALAFC").

The ALAFC and their member lines may be seriously prejudiced unless the Commission's Report and Order under review, Imposition of Surcharge by the Far East Conference at Searsport, Maine, F. M. C. Docket No. 65-29, 6 Pike & Fischer SRR 757 (November 5, 1965) [hereinafter cited as "Surcharge at Searsport"], are held to be invalid. Certain of the member lines of the ALAFC also operate between Canada and the Latin American areas served by the ALAFC. The ALAFC does not control or participate in the making of any rate applicable from Canada to Latin America.

The Commission in Surcharge at Searsport ordered the Far East Conference ("FEC") to open the rate on newsprint at Searsport, and the carriers serving that port to file and observe "non-discriminatory" rates. Charging a higher rate at Searsport than is charged at St. John was found to be discriminatory (Rep. 6-8).* The Commission attributed to the FEC and its member lines serving Searsport some sort of vicarious responsibility for the rate action of the lines in the trade from St. John, New Brunswick, to Manila although the FEC and the carriers serving Searsport have no control over rates from Canada.

Each of the southbound conferences included in the ALAFC publishes a tariff setting forth rates for 1200 to 5000 separate items. If the Commission's order is permitted to stand, it may, in the future, apply the same novel concept to the ALAFC and the member lines and arbitrarily order them to reduce any of their numerous rates to whatever level happens to be charged in other trades.

[•] Searsport is within the range of every conference in the ALAFC. Certain of the member lines that serve the range of ports also serve St. John.

^{**} Citations to the Commission's Report and Order in Surcharge at Searsport refer to the Commission's printed copy of its Report and Order. Since the parties have not agreed as to the material to be included in the joint appendix, it was not possible at the time of printing to refer to the joint appendix.

Introduction.

It is the position of the ALAFC that \$15 of the Shipping Act. 1916, 39 Stat. 728, chapter 451; U. S. C. A. Title 46, \$800 et seq. [hereinafter cited as "Shipping Act"], does not authorize the Commission to regulate or fix rates either directly or indirectly in the guise of a remedy for a violation of the Shipping Act. Even if the Commission could use \$15 to regulate rates, its holdings in the present case are erroneous. Lacking the power to fix minimum rates or any jurisdiction over rates from Canada, the Commission cannot order the conference to open a rate from an American port or otherwise fix a rate unless the conference rate violates one of the sections of the Shipping Act dealing specifically with rates. The Commission's interpretation of the "contrary to the public interest" standard, which imposes upon the conference the burden of showing that any challenged conference action contributes toward the public interest, is erroneous as a matter of law.

ARGUMENT.

I. The Commission Has No Power to Disapprove, Fix or Regulate Rates Under §15 of the Shipping Act, 1916.

The Commission, in Surcharge at Searsport, holds that since §§15 and 22 of the Shipping Act authorize it to "disapprove, cancel or modify" any agreement which it finds violates the standards of §15, it "obviously may take lesser action; we may declare the newsprint rate at Searsport 'open'" (Rep. 10). It states that "it will be more expedient to alter the rate structure . . ." than to eliminate Searsport from the range of conference ports, and "we resort to individual rate fixing . . ." (Rep. 10). In the hope of eliminating the rate differential, the Commission would compel the FEC to "open" the rate on newsprint from Searsport and the carriers serving the trade between Searsport and Manila to eliminate the allegedly discrimina-

tory surcharge by charging the lower, possibly unreasonably low, rate charged by other carriers serving between St. John, New Brunswick, and Manila. The Commission seeks to compel this rate reduction even though it found in Imposition of Surcharge on Cargo to Manila, Republic of the Philippines, F. M. C. Docket No. 1155, 5 Pike & Fischer SRR 788 (February 3, 1965), that the surcharge was justified because it would produce revenue which would reasonably approximate the carriers' additional costs.

The Commission is not authorized by §15 of the Shipping Act to fix rates. The prior decisions of the Commission and the courts, together with the legislative history of Public Law 87-346, 75 Stat. 762 (1961), amending the Shipping Act, establish that §15 is not a rate regulation section. §15 sets forth standards for Commission approval or disapproval of conference agreements but not for regulating rates fixed pursuant to a conference agreement. agreed upon by conference members do not constitute an "agreement" within the meaning of §15. If the Commission finds that a basic conference agreement, as carried out by the parties, operates in a manner that violates the provisions of §15, it may disapprove, modify, or cancel the basic agreement, but it may not alter rates fixed pursuant to the agreement. Absent a violation of some other section of the Shipping Act, the Commission may not rely upon this section to deprive a conference of the power to fix rates.

Since 1916, §15 of the Shipping Act has provided that "every agreement . . . fixing or regulating transporation rates or fares" shall be filed with the Commission; that the Commission may (or, since 1961, "shall") "disapprove, cancel or modify any agreement" which violates certain general standards set forth in §15: and that all agreements "shall be lawful only when and as long as approved by the [Commission]; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification or cancellation."

The question whether or not conference tariff rates are "agreements" within the meaning of §15 of the Shipping

Act was decided in 1927. The Commission* then held, in Section 15 Inquiry, 1 U.S.S.B.B. 121 (1927), that the basic conference agreement was an "agreement" within the meaning of §15 but that the tariff rates fixed pursuant to the conference agreement were not.

From 1927 until the Shipping Act was amended in 1961, the Commission's predecessors consistently held that rates fixed by conferences were not agreements within the meaning of \$15.

In 1961, this court upheld the Commission's long standing interpretation of \$15 that the expression "every agreement" did not include conventional rate changes or other "day-to-day" transactions, Empire State Highway Transp. Ass'n. v. Federal Maritime Board, 110 App. D. C. 208, 291 F. 2d 336 (1961). Thereafter, also in 1961, Congress amended §15 to provide expressly that tariff rates, fares, and charges, and the classifications, rules, and regulations explanatory thereof shall be permitted to take effect without prior approval by the Commission. On April 28, 1961, the day after this court's decision in Empire State Highway Transp. Ass'n, supra, while this amendment to §15 was being considered by the Special Subcommittee on Steamship Conferences of the House Committee on Merchant Marine and Fisheries ("Bonner Committee"), Mr. James Pimper, General Counsel of the Commission, testifying before that Committee, stated that the effect of this court's decision and the amendment to \$15 would be as follows:

"Mr. Pimper. Incidentally, on this point, the Circuit Court of Appeals for the District of Columbia handed down a decision yesterday saying that conference tariffs as such were not new agreements within the meaning of section 15 and did not have to be specifically approved by the Board, so that this language that you have in here basically is, in my opinion, a statement of what at least this court found the law to be at the present time.

The Commission's predecessors, charged with the administration of the Shipping Act from 1916 to 1961, are generally referred to herein as the "Commission" rather than by their various titles.

"Mr. Stakem. But, Mr. Pimper, did that court case go to the matter of rules and regulation [sic] of tariffs?

"Mr. Pimper. No, just the question of the rates." Hearings before the Special Subcommittee on Steamship Conferences of the Committee on Merchant Marine and Fisheries, House of Representatives, on H. R. 4299, 87 Cong., 1st Sess. at 477 (1961) [hereinafter cited as "Hearings on H. R. 4299"."].

Assertions by the Commission prior to 1961, that it would disapprove a conference agreement because it operated to the detriment of the commerce of the United States if the agreement caused rates to be so unreasonably high or low as to be detrimental to the commerce of the United States recognized that rates are not agreements under §15. See: Edmond Weil v. Italian Line, "Italia", 1 U.S.S.B.B. 395 (1935); Seas Shipping Co. v. American South African Line, Inc., 1 U.S.S.B.B. 568 (1936); Pacific Coast-River Plate Brazil Rates, 2 U.S.M.C. 28 (1939); and Cargo to Adriatic, Black Sea, and Levant Ports, 2 U.S.M.C. 342 (1940).

For example, in Seas Shipping Co., supra, the Commission found that the conference involved had reduced rates to a non-compensatory level. It found that such unreasonably low rates would eventually be detrimental to the commerce of the United States because "commerce" embraces vessels as well as cargo. However, it also found that the rate reduction had been caused by competition from a nonconference line rather than by the operation of the conference agreement itself. The Commission concluded that the operations of the conference had tended to stabilize rates and had delayed a rate war in the trade. The Commission dismissed the complaint on the ground that the conference agreement had not caused the unreasonably low rates. It recognized that it should not compel a conference to adjust its rates in relation to those of a non-conference carrier if it could not regulate the non-conference carrier's rates, stating:

^{*} H. R. 4299 was subsequently renumbered H. R. 6775.

"Had the power been given this Department to compel complainant, defendants, and all other carriers in the trade to raise their rates, the situation is such that that power would now be exercised. Were the agreement under consideration actually responsible for the low rates in the trade, the Department's course of action under existing power would also be clear. . . . Furthermore, where the agreement to be disapproved at this time, thus leaving each of defendants free to charge whatever rates it desired, there is reason to believe that rates might go still lower, to the greater detriment of the American merchant marine." 1 U.S.S.B.B. at 583.

The Commission's decision in Seas Shipping, supra, recognized that the Commission cannot eliminate rate differences if it lacks the power to fix minimum rates for all of the carriers involved. Mr. Justice Stone, in his dissent in Texas & Pacific Ry. Co. v. United States, 289 U. S. 627 (1933), discussed the significance of an absence of power to set minimum rates. At pages 664-66, he noted that prior to 1920, during the period when the Interstate Commerce Commission could not set minimum rates, that Commission could not fix differential rates to ports because differential rates on different roads cannot be fully controlled without the fixing of a minimum rate. However, the Interstate Commerce Commission could at that time prohibit unjust discriminations produced by the relation of rates charged by the same carrier. The Shipping Act does not empower the Commission to set any minimum rates, particularly minimum rates with respect to foreign-toforeign trades. Therefore, it cannot fully control rate differentials between United States and foreign ports.

In Surcharge at Searsport, the Commission, although not confronted with unreasonable rates from Searsport, is faced with a rate differential that it cannot effectively eliminate since it cannot control rates from St. John.

As recently as December 9, 1965, one month after the Commission served its decision in Surcharge at Searsport, the Commission reaffirmed the interpretation of its prede-

cessor in Seas Shipping, supra. In Iron and Steel Rates, Export-Import, F.M.C. Docket No. 1114, 6 Pike & Fischer SRR 827 (Dec. 6, 1965), the Commission stated:

"Another matter of concern in this investigation is our authority under Section 15 to question rates.

"A long-standing view in Commission precedents is that the Commission may disapprove a conference under circumstances where a conference rate is so unreasonably high or low as to be detrimental to the commerce of the United States. While the Examiner appears to recognize this as being sound, he notes that the present record would not justify a finding that the agreements of the respondent conferences should be disapproved, cancelled, or modified, for it has not been shown that the agreements themselves have been the direct instrumentality of or used for the violation of either Section 17 or Section 18(b)(5), or that there has not been a showing that the conference rates on steel are violative of either of those sections. We agree. However, the question of whether we could have taken action under Section 15 remains." 6 SRR at 837. (Emphasis added.)

After quoting from Edmond Weil, supra, the Commission continued:

"We agree that this is still a proper statement of our power under Section 15; we may disapprove or modify a conference agreement under Section 15, if the rates set by that conference are so unreasonably high or low as to be detrimental to the commerce of the United States." 6 SRR at 838. (Emphasis added.)

We agree that a conference agreement cannot be disapproved because of rates unless the record would justify a finding that the agreement itself has been the direct instrumentality of or used for the violation of either §17, concerning unjust discrimination, or §18(b)(5), concerning unreasonably high or low rates. No finding of a violation

of either section has been made in this case. We disagree with the Commission's contention that, acting solely under §15, it can disapprove a conference agreement if a rate fixed pursuant thereto is so unreasonably high or low as to be detrimental to the commerce of the United States. Prior to 1961, the Commission had merely threatened to exercise this power so that it was legally questionable whether §15 actually authorized such action. In 1961, Congress added §18(b)(5) to the Shipping Act, specifically empowering the Commission to disapprove such unreasonable rates. The legislative history surrounding the enactment of §18(b)(5) indicates that Congress intended that section, and other provisions specifically dealing with rates, to define completely the Commission's power to regulate rates.

Except for Surcharge at Searsport, we know of no decision since 1916 in which the Commission has even asserted any power under §15 to disapprove an agreement because of a rate in the absence of a finding that the rate is so unreasonably high or low as to be detrimental to the commerce of the United States. The Commission's discussion of its power in Iron and Steel Rates, supra, decided after the instant case, defines its powers under §15 in a manner which would preclude it from disapproving the FEC agreement in Surcharge at Searsport.

The legislative history preceding the enactment of Public Law 87-346 establishes that Congress knew that the Commission lacked the power to regulate rates generally vested in agencies regulating domestic carriers and chose not to grant the Commission any greater power than it already had. As we shall show further below, among the rate regulation provisions which Congress rejected, at the recommendation of the Commission's predecessor, was one which would have authorized the Commission to determine whether or not the rate from Searsport involved herein should be reduced to the level of the rate from St. John.

In 1959, the Bonner Committee held extensive hearings to determine what amendments should be made to the Shipping Act. On August 18, 1959, at the conclusion of these hearings, the then Chairman of the Federal Maritime Board Clarence Morse submitted several recommendations concerning amendments on behalf of the Board. With respect to rate regulation, the Board recommended:

"4. There should be no legislation regulating the level of rates in foreign commence. Any legislation pointed to rate fixing involves two basic problems. In the first place, a standard must be established which will specify what is a 'proper' rate. And in the second place, the statute would have to establish some sanction which can be brought to bear against carriers who charge other than a 'proper' rate.

"If the United States starts to follow this course, it is virtually certain that other countries will follow. Some will prescribe freight rates to aid their economy regardless of the cost or impact on the carrier..." 3 Hearings before the Special Subcommittee on Steamship Conferences of the Committee on Merchant Marine and Fisheries, House of Representatives, 86th Cong., 1st Sess. at 1801-1802 (1959). (Emphasis added.)

On February 15, 1961, Representative Bonner, Chairman of the Committee on Merchant Marine and Fisheries, introduced H. R. 4299, which, after numerous changes, was enacted into law as Public Law 87-346 amending the Shipping Act. As originally introduced, H. R. 4299, at page 6, lines 6-17, would have added language to Section 15 providing that:

"The Board shall disapprove any conference rate, fare, or charge which after hearings it finds to be so unreasonably high or low as to be detrimental to any segment of the commerce of the United States whether by unreasonably reducing or threatening to reduce the natural flow of any exports or imports, or otherwise. Whenever the Board finds any such rate, fare, or charge to be detrimental to any segment of the commerce of the United States it may fix and order enforced a reasonable maximum or minimum rate, fare, or charge, as the case may be, which it has

determined not to be detrimental to any segment of the commerce of the United States." Index to the Legislative History of the Steamship Conference/ Dual Rate Law, 87th Cong., 2d Sess. at 62 (1962) [hereinafter cited as "Index"].

As soon as hearings commenced on March 20, 1961, the Department of Commerce submitted a written recommendation, on behalf of itself and of the Federal Maritime Board, that the above quoted language be deleted. This statement, which the Committee included in its report to the House, reads:

"(13) At page 6, line 17, we recommend that the language from line 6 through line 17 be stricken. While we favor what we believe to be the objective of this provision, namely, the placing of U.S. importers and exporters on a competitive parity as to freight rates with foreign importers and exporters, we believe that the solution proposed in the bill is unworkable. In order for governmentally fixed rates to abide by the constitutional prohibition against the taking of property without just compensation, a rate must have some relation to the costs of the carrier. As proposed in the bill, the Board would fix rates in the foreign commerce so as to avoid detriment to the commerce of the United States. In a single conference it is not unusual to have 20 member lines operating vessels of 10 or 15 different flags, all having different costs of operation, precise information as to which is not in the possession of the Board. For the Board to attempt to fix a single rate or maximum and minimum rates which would be reasonable for all the conference members would. we believe, be impossible. As we understand this proposed section, it would call for an adjustment of rates between the United States and a given foreign market so as to put them into parity with the rates between a foreign port and the same foreign market, where the foreign-to-foreign rates are lower than the United States-to-foreign rates. The trade in which the lower foreign-to-foreign rates prevail (which prevent U. S. exporters from effectively competing with foreign exporters) might be served

by vessels of a flag or flags which have lower costs than any of the vessels serving the U. S. trade. Thus, to establish, under such circumstances, a rate which would not be detrimental to the commerce of the United States could result in the establishment of a rate lower than the actual costs of the carriers serving the U. S. trade." Index 131-32; Hearings on H. R. 4299 at 9. (Emphasis added.)

Draft Revision No. 2 of H. R. 4299 revised the proposed amendment to §15 to meet the Board's objections so that the proposed amendment read:

"The Board shall disapprove any conference rate, fare, or charge which after hearings it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States." Index 77.

This language, which, except for technical amendments, was retained in the bill that passed the House of Representatives, would simply have enacted into law the standard the Board had previously applied in Edmond Weil, supra, and other cases, although it also would have empowered the Commission to disapprove rates directly without disapproving the Conference agreement. Thus, a proposal which would have permitted the Commission to fix rates from the United States to a given destination at a parity with rates from a foreign country to the same destination was considered and rejected by the House.

The subsequent history of the House provision concerning unreasonably high or low rates establishes that Congress, as well as the Federal Maritime Board, did not believe that the general standards of §15 authorize the Commission to regulate rates and that Congress was unwilling to expand the authority that the Commission has, under other sections of the Shipping Act, to regulate rates.

In the Senate, the bill was referred to the Committee on Commerce. That Committee deleted the provision of \$15 authorizing the Commission to disapprove rates so unreasonably high or low as to be detrimental to the com-

merce of the United States. In its report, the Committee explained the deletion as follows:

"5. Should the Commission be given the express power to determine the reasonableness of conference

freight rates?

"The bill would amend section 15, Shipping Act, 1916, to require the Commission to disapprove any conference rate, fare or charge which it finds so unreasonably high or low as to be detrimental to the commerce of the United States. Existing law empowers the Commission to disapprove any conference agreement which it finds detrimental to the commerce of the United States. Prior boards have asserted, on occasion, that this power, though it does not speak of reasonableness of conference freight rates, authorizes disapproval of any conference's agreement if the conference's rates become so unreasonably high or low as to become detrimental to our foreign commerce. Apparently the threat to use its disapproval power has served adequately the regulatory agency's purposes.

"Your committee finds, however, that it would be a serious mistake at this time in world affairs for the U.S. Government unilaterally to assert by statute such a bold claim of right to sit in judgment of the 'reasonableness' of international ocean freight rates. That which is 'our' foreign commerce in New York is Italy's in Genoa. . . This position has been urged upon us by the Department of State, the Department of Commerce, all American and foreign flag ocean common carriers, and many American importers and exporters." Index 224-225. (Empha-

sis added.)

The Committee's report takes cognizance of the Commission's prior threats to disapprove a conference agreement because of unreasonable rates, but it doubts whether the Commission could enforce its threats. In order to avoid any claim that the Commission can sit in judgment of the reasonableness of rates, the Committee left the Commission's power in doubt.

On the floor of the Senate, Senator Kefauver offered an amendment to reincorporate the language passed by the House in §15. In a written explanation of his amendment, included in the Congressional Record, Senator Kefauver stated:

"If, then, we must increase monopoly power in ocean shipping by authorizing the dual-rate system, let us at least impose a minimum ceiling on the extent to which such power can be wielded to the detriment of American industry. This is what my amendment does. It acknowledges that these monopolies can set high rates—even unreasonably high rates. But, the rates must not be so unreasonable as to be detrimental to the commerce of the United States." Index 425.

Senator Kefauver also stated that if the language passed by the House was deleted by the Senate, Congress's failure to enact this language could be interpreted as a repudiation of the power that the Board had asserted in *Edmond Weil*,

supra, and other cases.

Senator Engle, floor manager of the bill in the Senate, stated that he considered the general language of §15, concerning detriment to the commerce of the United States, adequate to cover the problem. He pointed out that the committee had deleted the language in question because they did not want to get the Commission into the business of rate setting and they were perfectly sure that findings made by the Commission in a rate proceeding would not be binding on foreign flag lines. The following exchange then occurred:

"Mr. Kefauver. It is not the intention of the amendment to authorize the Commission to try to fix specific rates. It is the intention of the amendment to give the Commission similar authority to that the Civil Aeronautics Board has in connection with international airline rates. In that case the rates are fixed, or suggested, by the international body. Then they are submitted to the CAB, and the CAB can throw them out if it thinks they are unreasonable. That kind of concept is what I have in mind in connection with this amendment.

"Mr. Engle. But the rates have to be unreasonable to the point that they are detrimental to the commerce of the United States.

"Mr. Kefauver. That is what the amendment

states.

"Mr. Engle. With that understanding, and with that legislative record on the matter, I am perfectly satisfied to accept the amendment." Index 426. (Emphasis added.)

After being passed by the Senate, the bill was sent to a conference committee where the provision in question was

moved from \$15 to \$18(b)(5).

The legislative history of Public Law 87-346 amending the Shipping Act discussed above, establishes that Congress did not intend to authorize the Commission to fix or regulate any rates except to the extent that it was specifically authorized to do so by \$\$17 and 18(b)(5).

The reports accompanying the bill in both the House and the Senate also specifically recognized that the Commission lacked the rate regulation powers granted to agencies regulating domestic carriers, and that shipping conferences had far broader powers to set their own rates than domestic carriers.

The House report states:

"Steamship conferences are associations of steamship lines serving particular trade routes in world commerce and are intended under our law as a means of providing stability for both carriers and shippers through supervised self-regulation among competing carriers on particular routes. Under the conference system, conference members may not only fix freight rates but on occasion agree upon other matters.

"To maintain the balance between unbridled competition on the one hand and monopoly on the other, governmental rate regulation is exercised in our domestic economy over such industries as railroads, truck, airlines, public utilities, and domestic shipping. In international ocean shipping, however, it is difficult for any single government to regulate ocean freight rates." Index 113.

The Senate Report, listing economic justifications for allowing conferences, states:

Third, is the absence of any governmental control over the level of ocean freight rates.—Whereas Congress has vested rate control powers and responsibilities in Government regulatory agencies concerned with domestic surface and air transportation, it has heretofore given to the maritime regulatory agencies no similar mandate over international shipping rates. Thus, in ocean shipping there is no floor to rates, which a distressed carrier, or one which must make the voyage for other considerations that [sic] immediate profit, may charge." Index 204.

In the absence of any power to set a floor to rates charged from St. John, New Brunswick, the Commission cannot, under any section of the Shipping Act, compel the FEC or the carriers serving Searsport to reduce their rates to eliminate alleged discrimination.

The Senate, in its report, also listed as an economic advantage of conferences, the ability of conferences to set rates at a sufficiently high level to permit high cost American lines to compete for the traffic, stating:

"Fourth, is the difference in operating costs of similar vessels flying different flags.—No extended discussion is needed of the fact that the operating and capital costs of American-flag ocean common carriers are considerably higher than those of any other nation. Since most carriers cannot operate as cheaply as some competitor which possesses national cost advantages, the conference affords a device whereby all carriers working as a group, set rates at a point where such an advantage is not absolutely controlling." Index 204.

The legislative history of the rate provisions of the 1961 amendments to the Shipping Act and the general statements contained in the reports accompanying these amendments establish that Congress intended to allow the conferences to establish rates at levels of their own choosing provided that the rates so established did not conflict

with one of specific rate provisions. Between 1916 and 1961, the Commission enumerated only one ground for disapproving an agreement because of rates in the absence of a violation of a section other than §15, i.e., that the rates fixed pursuant to the agreement were so unreasonably high or low as to be detrimental to the commerce of the United States. Congress considered the limited rate making powers of the Commission and specified, in the Shipping Act, the powers that it intended to grant the Commission to regulate rates. §§17 and 18(b)(5) deal specifically with the Commission's powers to regulate rates on the basis of discrimination, prejudice, or reasonableness. These criteria, discrimination, prejudice, and reasonableness, are the basic criteria of rate regulation. The fact that §§17 and 18(b)(5) severely restrict the Commission's rate regulation powers indicates that Congress intended the Commission to have no greater power to regulate, not that Congress intended the Commission to turn to §15 to expand its powers. As this court has held in Maiatico v. United States, 112 App. D. C. 295, 302 F. 2d 880 (1962), quoting from MacEvoy Co. v. United States, 322 U. S. 102, 107 (1944):

"However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment... Specific terms prevail over the general in the same or another statue which otherwise might be controlling." Ginsberg & Sons v. Popkin, 285 U. S. 204, 208 [52 S. Ct. 322, 76 L. Ed. 704]." 302 F. 2d at 886.

Accordingly, the Federal Maritime Commission may not employ the general provisions of §15 to compel the FEC to reduce rates from Searsport in the absence of a finding of a violation of the specific provisions of the Shipping Act dealing with rates.

With respect to the remedy that it would employ, the Commission asserts that since it has the power to modify the basic conference agreement by eliminating Searsport from the range of ports covered by that agreement, "we obviously may take lesser action" and declare the rate open, alter the rate structure, or fix individual rates (Rep. 9). Far from being obvious, the Commission's assertion of power represents a unique attempt to evade the limitations on its power to regulate rates and directly conflicts with the express provisions of §15 that it "shall disapprove, cancel or modify" any agreement that it finds conflicts with

the provisions of §15.

The Commission's order directing the FEC to "open" its rate at Searsport would deprive the FEC of the power to control and stabilize rates at Searsport. Its direction to the carriers to file rates which are not discriminatory to Searsport, viewed by the Commission as rates as low as or lower than the rates charged from St. John, would compel the carriers to compete for traffic on the basis of rates. The maximum rate chargeable at Searsport would be determined by carriers serving St. John. This situation would probably bring about the type of rate war and cutthroat competition which Congress sought to avoid when it authorized conferences to set rates."

In support of its contention that it may fix rates, the Commission relies in part on the provisions of §22 authorizing it to investigate any violation of the Shipping Act "and make such order as it deems proper," and it cites California v. United States, 320 U.S. 577, 582 (1944):

"Having found violations of §§16 and 17, the Commission was charged by law with the duty of devising appropriate means for their correction." (Rep. 11)

However, in California v. United States, the Court found that the Commission was authorized by the provisions of §17 to employ the remedy it used in that case or to choose

[•] In Imposition of Surcharge on Cargo to Manila, supra, the Commission ordered a non-conference carrier, as well as Maersk Line, serving both Searsport and St. John, to eliminate the difference between its rates. We assume, in the absence of findings to the contrary, that this non-conference carrier is still serving Searsport and charging the lower rate charged by carriers from St. John.

another remedy authorized by §17. Similarly, in the instant case, if its finding of violation could be supported, the Commission would be free to choose among the remedies authorized by §15 and disapprove, cancel, or modify the conference agreement, but it cannot ignore the mandate of Congress

and employ other remedies of its own choosing.

The order by the Commission herein is ambiguous because it states that if the FEC and its member lines do not obey its orders by opening the conference rate and establishing rates that are not discriminatory (i.e., not higher than from St. John), it will remove Searsport from the scope of the FEC agreement. The order could be interpreted to mean that despite its holding that it can open and fix rates under §15, the Commission, if its order is ignored, would not risk a judicial test of its power, but would instead revert to the authorized remedy of removing Searsport from the agreement. Such an interpretation would indicate that there was a difference between the true grounds for Commission action, as stated in its report, and the grounds upon which it dared rely for purposes of judicial review.

For the reasons stated above, the Commission is not authorized by §15 to regulate or fix rates either directly or

as remedy for violations of the Shipping Act.

II. The Commission Misinterpreted the "Contrary to the Public Interest" Standard.

In Surcharge at Searsport, the Commission interpreted for the first time the "contrary to the public interest" standard which was added to §15 of the Shipping Act in 1961. This section now reads, in part:

"The Commission shall . . . after notice and hearing, disapprove, cancel or modify any agreement . . . that it finds to be . . . contrary to the public interest . . . and shall approve all other agreements" Public Law 87-346, 75 Stat. 763, U.S.C.A., Title 46, §814.

The Commission stated that in exchange for granting carriers the "privilege" of forming rate-making conferences, "we insist that these arrangements contribute in some manner toward public interest" (Rep. 9). Because the FEC failed to show that its activities concerning the newsprint rate contributed to the public interest, the FEC agreement was held to operate contrary to the public interest.

The Commission, as a matter of law, misconstrued "contrary to the public interest." When Congress enacted this provision, it intended to adopt the ordinary meaning of "contrary," i.e., "diametrically different" or "opposed." Webster's Third New International Dictionary, 495 (1961). A simple reading of §15 reveals that carriers possess the right to form rate-making conferences. If the remaining requirements of §15 are satisfied, conference agreements must be approved unless these agreements are shown to be opposed to the public interest.

That Congress never intended to impose a costly affirmative burden upon the conferences is apparent from an examination of the legislative history of Public Law 87-346. As originally introduced in H.R. 4299 by Congressman Bonner. §15 would have been amended to read:

"The Board . . . shall approve all other agreements, modifications, or cancellations that it affirmatively finds to be in the public interest." Index 27. (Emphasis added.)

The Department of Commerce and the Federal Maritime Board promptly recommended that the words "that it affirmatively finds to be in the public interest" be deleted because such a requirement would prevent approval of agreements that could not be shown to positively contribute to the public interest. Their report stated:

"... we recommend that the words 'that it affirmatively finds to be in the public interest' be stricken. In conformity with other similar statutes, such as the Aviation Act of 1958, we believe that if a public interest standard is to be applied by the Board, it should be phrased in terms of permitting the approval

of agreements which the Board does not find to be adverse to the public interest. See 49 U. S. C. 1382(b). Requiring a positive finding in favor of the public interest would prevent carriers from operating under arrangements which, although not meriting disapproval under the standards of the statute, could not be shown to positively contribute to the public interest." Hearings on H. R. 4299 at 7. (Emphasis added.)

In Draft Revision No. 2 of H. R. 4299, published April 13, 1961, the Bonner Committee responded to this suggestion by changing the critical passage to read:

"The Board . . . shall approve all other agreements, modifications, or cancellations that it finds not contrary to the public interest." Index 27-28.

The Department of Commerce's recommendation was then attached to the Report of the House committee published June 8, 1961. See *Index* 112, 124-125, 129. Thereafter, the Senate Committee on Commerce changed this provision from a standard for approval ("shall approve all... agreements... that it finds not contrary" etc.) to a standard for disapproval ("shall... disapprove... any agreement... that it finds to be... contrary" etc.). See *Index* 28. As a result of this amendment, in the absence of any finding concerning public interest, the agreement must be approved.

Accordingly, this court has held that disapproval of these agreements is authorized only when the Commission finds as a fact that the agreement operates either detrimentally to United States commerce, against the public interest, unfairly between the carriers, or in violation of the Shipping Act. Aktiebolaget Svenska Amerika L. v. Federal Maritime Commission, App. D. C., 351 F. 2d 756, 761, fn. 9 (1965). In this connection, the Ninth Circuit has decided that a federal "commission, as a condition of its approval, may not impose a more burdensome requirement in the way of proof than that prescribed by law." Pacific Power & Light Co. v. Federal Power Commission, 111 F. 2d 1014, 1016 (9th Cir. 1940).

In Pacific Power & Light, supra, the court found that the Federal Power Commission had misinterpreted the relevant statute in denying an application for approval of a proposed merger. That Commission had construed the provision that a merger "be consistent with the public interest," Act of 1935, 49 Stat. 850, U. S. C. A., Title 16, §824b(a), to require a showing by the applicant of positive benefit to the public. The Ninth Circuit, however, held that the passage demanded a showing of compatibility with, rather than contribution to, the public interest. The case was remanded to the Federal Power Commission to reconsider its decision in view of the less burdensome standard imposed by the law. With respect to the Shipping Act, the policy of refusing to impose a more burdensome requirement of proof than that prescribed by law has been applied by the Commission. T. F. Kollmar, Inc. and Wagner Tug Boat Co., 7 F. M. C. 511 (1963).

Attempting to support its "interpretation" of "contrary to the public interest," the Commission cites language in Pacific Coast European Conference, 7 F. M. C. 27, 37 (1961). That case concerned not the application of the standard but the obligation of conferences to keep the Commission advised of their activities. Although the Commission spoke loosely about the public interest, it recognized that the §15 standard would require a finding that an agreement was "incompatible with the public inter-

est." 7 F. M. C. at 35.

It is thus evident that the Commission has acted arbitrarily and without foundation in law. Neither the ordinary meaning of the terms of §15 nor the legislative history of that section justifies the Commission's representation that the "contrary to the public interest" standard necessitates a showing of contribution to the public interest. This court should not permit the language of §15 to be construed to mean more than it says, contrary to the intention of Congress.

Conclusion.

For the reasons stated above, the Order of the Commission here for review should be determined to be invalid and should be set aside, and its enforcement should be perpetually enjoined.

Respectfully submitted,

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New York, New York March 19, 1966

Certificate of Service.

I, John R. Mahoney, attorney of record for the amici curiae herein, do hereby certify that on March 19, 1966, I served a copy of the Brief Amici Curiae for the Associated Latin American Freight Conferences upon the following:

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by mailing a copy, via first class mail, postage prepaid, to each of them at the addresses beneath their respective names.

New York, New York March 19, 1966

Appendix A.

Steamship Conferences.

Atlantic & Gulf/Panama Canal Zone, Colon & Panama City Conference.

Atlantic & Gulf/West Coast of Central America & Mexico Conference.

Atlantic & Gulf/West Coast of South America Conference.

East Coast Colombia Conference.

Havana Northbound Rate Agreement.

Havana Steamship Conference.

Leeward & Windward Islands & Guianas Conference.

Santiago de Cuba Conference.

United States Atlantic & Gulf-Haiti Conference.

United States Atlantic & Gulf-Jamaica Conference.

United States Atlantic & Gulf-Santo Domingo Conference.

United States Atlantic & Gulf-Venezuela and Netherlands Antilles Conference.

West Coast South America Northbound Conference.

The Following Common Carrier Steamship Lines Are Members of One or More of the Foregoing Conferences: Alcoa Steamship Company, Inc.

Booth Lamport West Indies Service:

Booth Steamship Company, Limited. as one
Lamport & Holt Line, Limited. member only
Booth Steamship Company, Ltd.

Chilean Line (Compania Sud-Americana de Vapores).

Coldemar Line (Compania Colombiana de Navegacion Maritima, Ltd.).

Corporacion Peruana de Vapores (Peruvian State Line). Dominican Steamship Line (Flota Mercante Dominicana, C. por A.).

Dovar Line (Dovar, S. A. International Shipping & Trading Company).

Flota Mercante Grancolombiana, S. A.

Global Bulk Transport, Incorporated and as one
States Marine Lines, Incorporated.

member only

Grace Line Inc.

Gulf & South American Steamship Co., Inc.

Lykes Bros. Steamship Co., Inc.

Mamenic Line (Marina Mercante Nicaraguense, S. A.).

Moore-McCormack Lines, Inc.

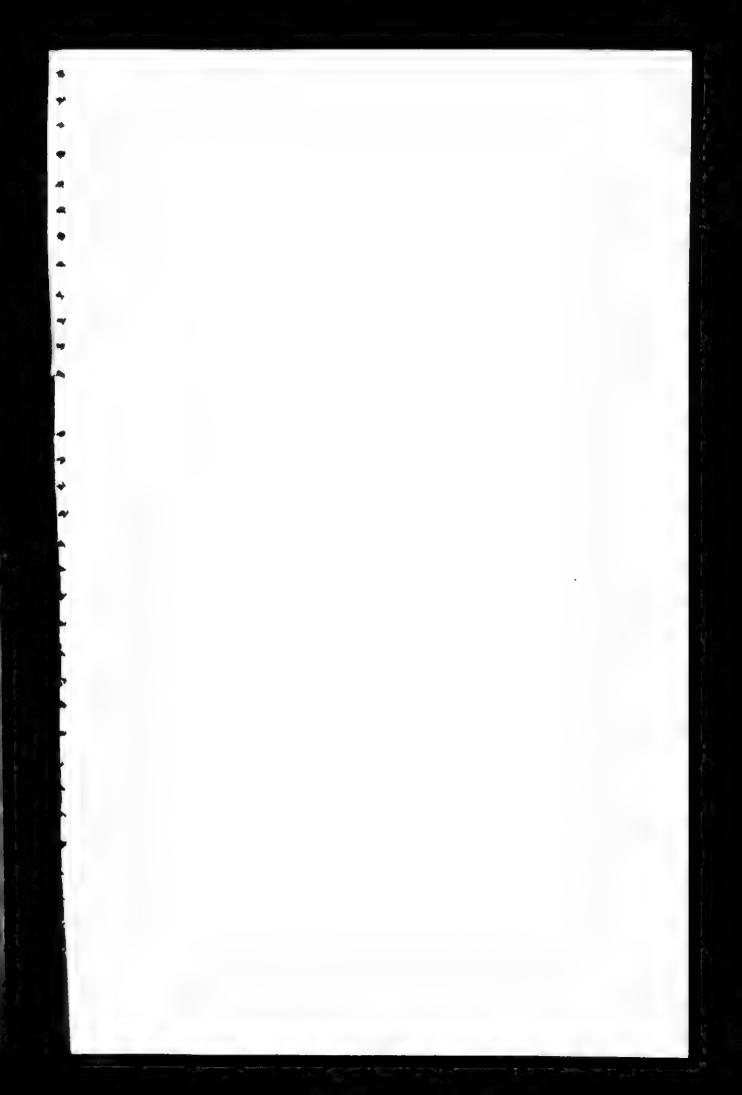
Royal Netherlands Steamship Company (Koninklijke Nederlandsche Stoomboot Maatschappij N. V.).

Sea-Land Service, Inc.

United Fruit Company.

Vera Cruz & Caribbean Shipping Corporation of Panama (Andes Line).

West Coast Line S. A. (West Coast Line).



IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 19,790

FAR EAST CONFERENCE, et al.,

Petitioners,

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF ORDER OF THE FEDERAL MARITIME COMMISSION

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IRWIN A. SEIBEL W. RICHARD HADDAD Attorneys

Department of Justice

JAMES L. PIMPER General Counsel

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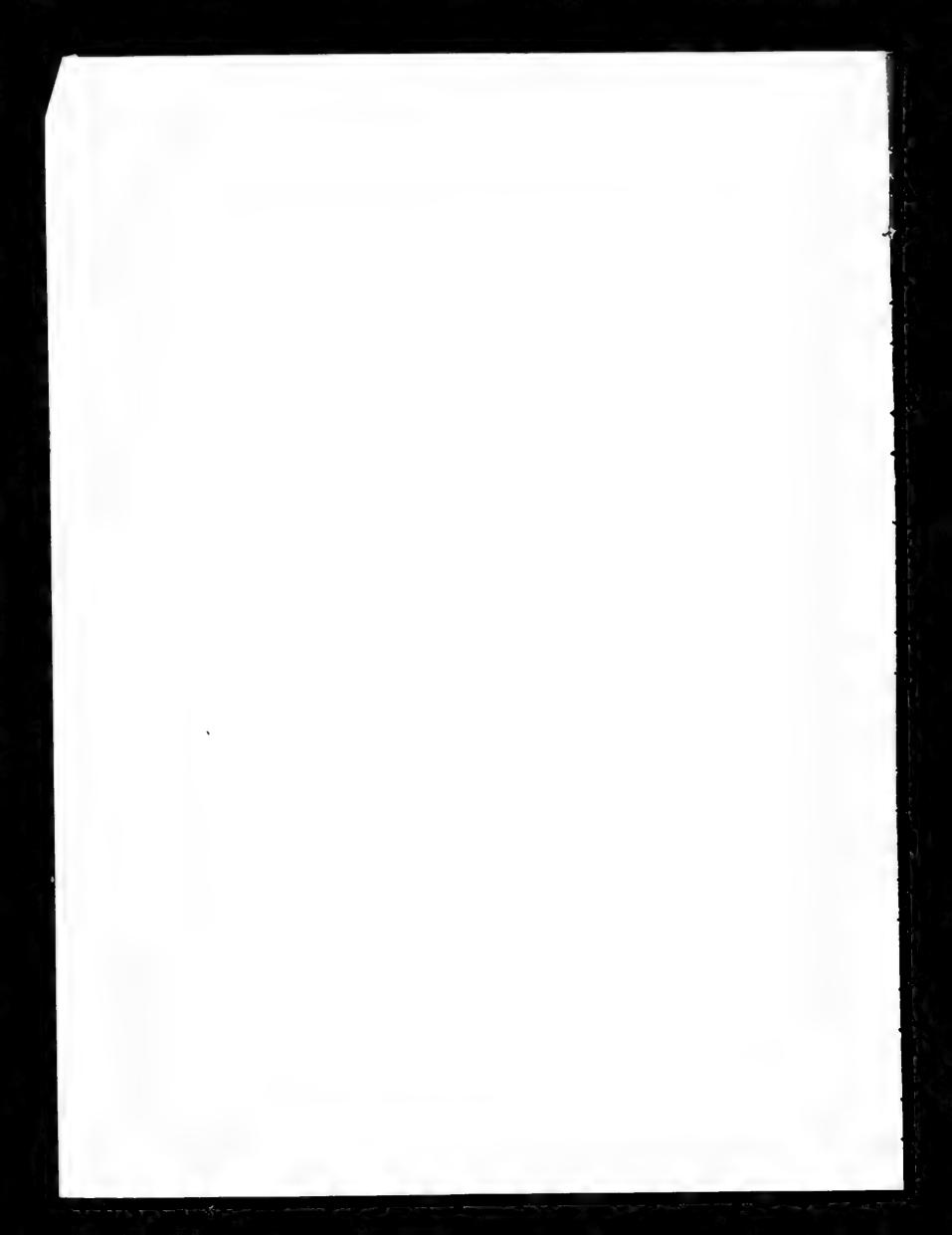
Federal Maritime Commission

Washington, D. C. April 8, 1966

United States Court of Appeals for the District of Columbia Circuit

FILED APR 5 1966

Nathan Daulson



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SUMMARY OF ARGUMENT

The amici curiae brief of the Associated Latin America Freight Conferences (ALAFC) is directed to two points: (a) the Federal Maritime Commission's power to regulate rates under section 15 of the Shipping Act, 1916 (46 U.S.C. 814) and (b) the application of the public interest criterion of section 15. Principally, ALAFC assert that the Commission is powerless to use section 15 to regulate or fix rates. The ratemaking jurisdiction of the Commission is not the issue here. The Commission did not fix rates; rather, in a limited area, it circumscribed the Far East Conference's license to fix rates collectively. The Commission acted against the power to fix rates in concert, quite a different thing from ratemaking. As we show infra, ALAFC's other point that the Commission misapplied the public interest standard in section 15 is mistaken.

ARGUMENT

I. The Commission, after making the appropriate findings under section 15, acted to limit the Far East Conference's power to set rates collectively by declaring the rate on newsprint "open."

The order issued by the Commission in Docket No. 65-29 directs that the Far East Conference open the rate on newsprint at Searsport, Maine, on shipments to Manila, Republic of the Philippines. When a rate is open, the conference does not fix the rate. On the other hand, when a conference

rate is open on a particular commodity, each carrier sets the rate indil/
vidually and independently in accord with its own ratemaking criteria.

Therefore, when a commodity in a conference tariff bears a notation "open,"
the conference is not setting a rate. It is simply declaring that it is
not exercising jurisdiction over the rate on that commodity and the rate
is subject to quotation by the individual member lines. Therefore, the
open notation in a conference tariff is not itself a rate. It is a refusal
of the conference to exercise ratemaking on a particular commodity. While
this is fundamental, it is also dispositive of the contentions of AIAFC.
The Commission did not fix rates. It withdrew conference authority to set
the rate.

In Docket No. 65-29, the Commission made findings that the Far East Conference agreement has operated in a manner which is unjustly discriminatory or unfair as between exporters from the United States and their foreign competitions (JA 130-3). Furthermore, the Commission made findings that the Far East Conference agreement operated in a manner which is detrimental to the commerce of the United States and contrary to the public interest (JA 132-4). The Commission then found that the Conference's authority to set rates on newsprint is the major cause of the current discriminatory situation, i.e.

^{1/ &}quot;A rate is 'opened' when the Conference announces that the published rate is no longer applicable and the members are then free to negotiate their own rates with shippers to meet competition." American President Lines, Ltd. v. Federal Maritime Com'n, 114 U.S. App. D.C. 418, 419, 316 F.2d 419, 420 (1963). See also: Maritime Board v. Isbrandtsen Co., 356 U.S. 481, 487 (1958).

the agreement operated in a manner which was unjustly discriminatory to exporters and ports, detrimental to the commerce of the United States, and contrary to the public interest. Section 15 provides that upon making the proper findings the Commission may disapprove, cancel, or modify an agreement. Empire State Highway Transp. Ass'n v. Federal Maritime Bd., 110 U.S. App. D.C. 208, 291 F.2d 336 (1961), cert.den. 386 U.S. 931 (1961). Based upon these findings and the mandate of section 15, the Commission declared the rate on newsprint to be "open." In effect the Commission disapproved, cancelled, or modified (any of the three appeared to be appropriate) the Conference's authorization to set rates on newsprint collectively. In spite of repeated assertions to the contrary by AIAFC, this is not rate fixing. To dispel any false impressions arising from AIAFC's cut and paste version of what the Commission did (Brief amici curiae p. 3), we repeat the actual ruling of the Commission:

Therefore, the Commission has the power to take the action contemplated by the order to show cause that instituted this proceeding; that is, the Commission may modify the Far East Conference agreement to eliminate Searsport from the authorized trading range of the conference. Since we may take this action, we obviously may take lesser action; we may declare the newsprint rate at Searsport "open." Rather than modify the basic agreement, we believe it will be more expedient to alter the rate structure developed under the basic agreement. This will leave conference jurisdiction intact at Searsport, but it will require carriers serving that port to set rates individually on newsprint moving to Manila. Since the conference serves many destinations in addition to Manila, We believe it desirable not to curtail the scope of the agreement in any other respect. We resort to individual rate fixing because collective action has proven to be discriminatory. This order is authorized by section 15 and section 22. (JA 134-135)

The above-quoted text makes it clear that the Commission did not resort to rate fixing in any sense. By withdrawing the authority of the member lines to act in concert in fixing the rate for newsprint at Searsport, the only effect was to require each member line to fix its rate individually. Each line was thus free to fix its own rate and was not required by the Commission order to make a change in any way.

The argument of AIAFC that the Commission is powerless to set rates under section 15 is, therefore, plainly directed to an issue not in controversy here.

If the argument of ALAFC has any relevance, it may mean that the Commission is not permitted to scrutinize the ratemaking activities of conferences except under sections 17 and 18(b)(5) of the Shipping Act, 1916 (46 U.S.C. 816 and 817(b)(5)). As a reading of the statute confirms, the directives of sections 17 and 18(b)(5) are aimed at the rates of ocean carriers, both independent lines and conference members. Section 15, however, has a different role; it is directed against joint action affecting competition—either collective ratemaking or other anticompetitive activity. Sections 17 and 18(b)(5) were designed to permit limited rate regulation of persons subject to the Act, whether or not acting in concert. It would seem at odds with the regulatory scheme of the Shipping Act to

^{2/} Regulation and supervision of rates under section 15, while such rates of themselves are not section 15 agreements, is a Commission practice of long standing. See: Edmond Weil v. Italian Line "Italia," 1 U.S.S.B.B. 395 (1935); Seas Shipping Co. v. American South African Line, Inc., et al., 1 U.S.S.B.B. 568 (1936). In the Seas case relied upon by AIAFC, the Commission held that action against the conference would not serve to remedy the noncompensatory rate situation.

decide that sections 17 and 18(b)(5), which cover individual carrier rates, operate to limit any supervision over collective ratemaking under section 3/15. Moreover, the language of section 15 is itself a refutation of ALAFC's argument that Congress intended the Commission's authority to regulate agreements under section 15 to be limited to the question of whether the agreement is found to be in violation of the Act, e.g., the provisions of sections 17 or 18(b)(5). Section 15 in terms authorizes the Commission to modify or disapprove not merely any agreement found to be "in violation of this Act" but also any agreement found "to be unjustly discriminatory or unfair . . . or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest . . . "

As the Commission found, the situation, which was harmful to Searsport and to exporters using or wishing to use that port, was caused by the power of the conference to compel its members to observe a certain level of rates on newsprint at Searsport. Thus, the Commission acted against this ratemaking power, a power totally dependent upon the approval of the agreement by the Commission under section 15. The Commission did not compel the Far

This distinction is implicit in Iron & Steel Rates, Export-Import, FMC Docket No. 1114 (1965) contrary to the interpretation of ALAFC (Brief amici curiae 8-9) where the Commission stated that where a conference rate is found to be unreasonably high, the Commission may require its reduction or disapprove or modify the conference agreement. See also: Pacific Coast-River Plate Brazil Rates, 2 U.S.M.C. 28, 30 (1938); Cargo to Adriatic, Black Sea and Levant Ports, 2 U.S.M.C. 342, 347 (1940).

In order to carry out its regulatory responsibilities, the Commission has been given certain latitude to resolve questions under the Shipping Act such as unjust discrimination, detriment to commerce, etc. See Persian Gulf Outward Freight Conference v. Federal Maritime Commission, U.S. App. D.C. , F.2d (1966); Philip R. Consolo v. Federal Maritime Commission, 34 LW 4278 (March 22, 1966); International Packers Limited v. Federal Maritime Commission, U.S. App. D.C. , F.2d (1966).

East Conference to reduce rates from Searsport. The Commission did not attempt to impose minimum rates. The Commission did not order carriers to assess a lower rate. The Commission did not overrule its decision in Docket No. 1155 notwithstanding the repeated assertions to the contrary.

The Commission withdrew the authorization to set rates after making the findings explicitly required by section 15.

II. The Commission properly found that the Far East Conference agreement operated in a manner which was contrary to the public interest.

AIAFC argue that the Commission erred in requiring the Far East Conference to demonstrate that its agreement operated affirmatively in the public interest. While the Commission did state that the Conference had shown no concern for the public interest, its conclusion that the Conference agreement operated in a manner contrary to the public interest rests on its finding that the Conference "has actually aggravated a situation which we held to be contrary to section 17. Conference authority to set rates on newsprint at Searsport is the major cause of the current discriminatory situation." (JA 134).

The Conference's rule in this situation was described as follows:

Briefly, it is the conference whose refusal to amend its tariff that compels the continuance of a situation which has been found to be a violation of section 17. Although the actual instrumentality of discrimination was Maersk in serving both Searsport and St. John, the underlying responsibility for the continuation of the discrimination rests with the conference. (JA 128)

^{5/} Parenthetically we note that the AIAFC position must be interpreted to mean that the disadvantage to Searsport and to a United States exporter is regrettable but irremediable.

^{6/} Aktiebolaget Svenska Amerika L. v. Federal Maritime Com'n, U.S. App. D.C., 351 F.2d 756 (1965).

Thus, the Commission clearly found that the Conference agreement was harmful to the public interest.

Respectfully submitted,

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Federal Maritime Commission

Washington, D. C. April 8, 1966